UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON MANPOWER AND PERSONNEL

OF THE

COMMITTEE ON ARMED SERVICES UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

AND

SECOND SESSION

ON

S. 1453

TO AMEND CHAPTER 73 OF TITLE 10, UNITED STATES CODE, TO PROVIDE FOR THE DISPOSITION OF THE RETIREMENT BENEFITS BETWEEN MEMBERS AND FORMER MEMBERS OF THE ARMED FORCES AND THEIR SPOUSES

S. 1648

ENTITLED THE "MILITARY SPOUSE RETIREMENT EQUITY ACT"

S. 1814

TO AMEND TITLE 10, UNITED STATES CODE, TO REQUIRE THE SECRETARY CONCERNED TO COMPLY WITH THE TERMS OF CERTAIN COURT ORDERS IN CONNECTION WITH THE DIVORCE, DISSOLUTION, ANNULMENT, OR LEGAL SEPARATION OF A MEMBER OR FORMER MEMBER OF A UNIFORMED SERVICE AND WHICH AFFECT THE RETIRED RETAINER PAY OF SUCH A MEMBER OR FORMER MEMBER, AND FOR OTHER PURPOSES

SEPTEMBER 22, 1981; FEBRUARY 10, MARCH 10, APRIL 29, 1982

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UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT

TUESDAY, SEPTEMBER 22, 1981

U.S. SENATE,
SUBCOMMITTEE ON MANPOWER AND PERSONNEL,
COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The subcommittee met in open session, pursuant to notice, at 10:07 a.m., in room 224, Russell Senate Office Building, Senator Roger W. Jepsen (chairman) presiding.

Present: Senators Jepsen and Exon.

Staff present: Paul C. Besozzi, minority counsel; David S. Lyles, José E. Martinez, and Anthony J. Principi, professional staff members; Richard D. Finn and Ralph O. White, Jr., research assistants; and Jacquie S. O'Grady, staff assistant.

Also present: Paul Schreiber, assistant to Senator Denton and Greg Pallas, assistant to Senator Exon.

[The bills S. 1453, S. 1648, and S. 1814 follow:]

S. 1453

A bill to amend chapter 73 of title 10, United States Code, to provide for the disposition of the retirement benefits between members and former members of the Armed Forces and their spouses

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 73 of title 10, United States Code, relating to annuities based on retired or retainer pay, is amended by adding after subchapter II the following new subchapter:

"SUBCHAPTER III—FORMER SPOUSE'S SHARE OF RETIRED OR RETAINER PAY

"Sec.
"1416. Nonpreemption of State law.

"§ 1461. Nonpreemption of State law

"For purposes of division of martial property of any member or former member of the armed forces upon dissolution of such member's marriage, the law of the State in which the dissolution of marriage proceeding was instituted shall be dispositive on all matters pertaining to the division of any retired, retirement, or retainer pay to which such member or former member is entitled or will become entitled."

(b) The table of subchapters at the beginning of chapter 73 of such title is amended by adding at the end thereof the following new item:

"III. Nonpreemption of State law---------- 1461".

A bill entitled the "Military Spouse Retirement Equity Act"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 101. (a)(1) Chapter 73 of title 10, United States Code, relating to annuities based on retired or retainer pay, is amended by adding after subchapter II the following new subchapter:

"SUBCHAPTER III—FORMER SPOUSE SHARE OF RETIRED OR RETAINER PAY

"§ 1461. Definitions

"In this subchapter and in subchapter II of this chapter:

"(1) 'Former spouse' means a former wife or husband of a member or former member who was married to that member or former member for not less than ten years during which that member or former member performed creditable service.

"(2) 'Court' means a court of a State or of the District of Columbia.

"(3) 'Court order' means a court decree of divorce or annulment, or a court order or court approved property settlement agreement incident to a final court decree of divorce or annulment, which orders that a portion of the retired or retainer pay of a member or former member, or a survivor annuity based on the service of such member or former member, be paid to a former spouse by the member or former member, by the Secretary concerned, or by the Government.

"(4) 'Pro rata share', in the case of a former spouse of a member or former member entitled to retired or retainer pay, means the percentage that is equal to the percentage that (A) the number of years during which the former spouse was married to the member or former member during the creditable service of that member or former member is of (B) the total number of years of such creditable service.

"(5) 'Spousal agreement' means any written agreement between a member or former member and that member or former member's spouse or former spouse which is in writing and acknowledged before a notary public.

"(6) 'Creditable service' means service credited to a member or former member for the purpose of determining the eligibility of that member or former member for retired or retainer pay.

"§ 1462. Former spouse share of retired or retainer pay

"(a) Unless otherwise expressly provided by any spousal agreement or court order described in section 1464 of this title, a former spouse of a member or former member who is entitled to retired or retainer pay is entitled to an annuity—

"(1) if married to the member or former member throughout the creditable service of the member or former member, equal to 50 percent of the retired or retainer pay of the member or former member; or

"(2) if not married to the member or former member throughout the creditable service of the member or former member, equal to the former spouse's pro rata share of 50 percent of the retired or retainer pay of the member or former member.

"(b) The amount of retired or retainer pay used for the computation of an annuity under this section shall be determined after any reduction in such retired or retainer pay required under section 1452 of this title.

"(c) A former spouse is not qualified for an annuity under this section if before the commencement of the annuity the former spouse remarries before becoming 60 years of age.

"(d)(1) An annuity of a former spouse under this section commences on the later of the day after the member or former member upon whose service the annuity is based becomes entitled to retired or retainer pay or the first day of the month in which the divorce or annulment involved becomes final.

"(2) Such annuity and the right to such annuity terminate—

"(A) on the last day of the month before the former spouse dies or remarries before becoming 60 years of age; or

"(B) on the date the retired or retainer pay of the member or former member upon whose service the annuity is based dies.

"(e) A former spouse is not entitled to an annuity under this subchapter based upon the service of a member or former member unless the former spouse elects to receive it instead of any other annuity to which the former spouse may be entitled under this chapter or any retirement system for Government employees on the basis of a marriage to someone other than the member or former member.

"§ 1463. Reduction in retired or retainer pay

"The retired or retainer pay of a member or former member shall be reduced by the amount of an annuity under this subchapter paid to a former spouse of that member or former member based on the service of that member or former member. Such reduction shall be disregarded in calculating any annuity under subchapter II of this chapter and in calculating any reduction in retired or retainer pay under section 1452 of this title.

"§ 1464. Spousal agreements and court orders

"(a)(1)(A) In the case of any member or former member who has a former spouse who is covered by a court order or who is a party to a spousal agreement—

"(i) any right of the former spouse to an annuity under section 1462 of this title in connection with the retired or retainer pay of the member or former member, and the amount of any such annuity; and

"(ii) any right of the former spouse to a survivor annuity under subchapter II of this chapter, and the amount of any such annuity.

shall be determined in accordance with that spousal agreement or court order, if and to the extent expressly provided for in the terms of that spousal agreement or court order.

"(B) This paragraph shall not apply in the case of any spousal agreement or court order which, as determined by the Secretary concerned is inconsistent with the requirements of this chapter.

"(2) Except with respect to obligations between members or former members and former spouses, payments under this chapter which would otherwise be made to a member or former member based upon that member or former member's service shall be paid (in whole or in part) by the Secretary concerned to another natural person to the extent expressly provided for in the terms of any order or any court decree of legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of legal separation.

"(3) Paragraphs (1) and (2) shall apply only to payments made under this chapter for periods beginning after the date of receipt by the Secretary concerned of written notice of such decree, order, or agreement, and such additional information and such documentation as the Secretary concerned may require.

"(b) Any payment under this subsection to any person bars recovery by any other person.

"(c) No spousal agreement or court order involving a member or former member may provide for an annuity or any combination of annuities under this subchapter which exceeds the amount of the retired or retainer pay of the member or former member, nor may any such court order relating to an annuity under this subchapter be given effect if it is issued more than 12 months after the date the divorce or annulment involved becomes final.

"(d) After the death of a member or former member, a court order may not adjust the amount of the annuity of a former spouse under this subchapter or subchapter II of this chapter.

"§ 1465. Nonpreemption of State law

"The 10-year requirement of section 1461(1) of this title, or any other provision of this chapter, shall not be construed to affect the rights any spouse or person formerly married to a member or former member may have, under any law or rule of law of any State or the District of Columbia, with respect to the retired or retainer pay of the member or former member.".

(2) The table of subchapters at the beginning of chapter 73 of title 10, United States Code, is amended by adding at the end thereof the following new item:

"III. Former Spouse Share of Retired or Retainer Pay ..... 1461".

(b) Section 1447 of title 10, United States Code, relating to definitions applicable to the Survivor Benefit Plan, is amended—

(1) by striking out "by the person providing the annuity" in paragraph (2) and inserting in lieu thereof "in accordance with section 1448(a)(3) of this title"; and

(2) by adding at the end thereof the following new paragraph:

"(6) 'Former spouse', 'pro rata share', 'spousal agreement', 'court order', and 'creditable service' have the meanings given such terms in section 1461 of this title.".

(c)(1) Subsection (a) of section 1448 of title 10, United States Code, relating to the application of the Survivor Benefit Plan, is amended—

(A) in paragraph (2)—

(i) by inserting "except to the extent otherwise provided under paragraph (3)," in clause (A) before "to a person";

(ii) by striking out "is married" both places it appears and inserting in lieu thereof "is married, has a former spouse,"; and

(iii) by striking out ", unless he elects" in clause (A) and all that follows through "that pay";

(B) by inserting "except to the extent otherwise provided under paragraph (4)," in clause (B) after "(iii)"; and

(C) by striking out paragraphs (3) and (4) and inserting in lieu thereof the following:

"(3)(A) Before becoming eligible for retired or retainer pay, a married person eligible under paragraph (1)(A) to participate in the Plan and such person's spouse may jointly elect not to participate in the Plan, to participate in the Plan at a reduced level, or to provide an annuity for a dependent child but not for the spouse. Any such election shall be in writing and shall be acknowledged before a notary public. In the event the marriage is dissolved following an election to participate at such a reduced level and the spouse qualifies as a former spouse, the base amount used in calculating an annuity as a former spouse under section 1450 of this title may not exceed the base amount designated under this subparagraph. An election under this subparagraph not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay.

"(B) A person eligible under paragraph (1)(B) to participate in the Plan who is married may not make an election under subclause (iii) of such paragraph to participate in the Plan at a reduced level or to provide an annuity for a dependent child but not for the spouse without the agreement of the spouse. Any such agreement shall be in writing and shall be acknowledged before a notary public. In the event the marriage is dissolved following an election for participation in the Plan at a reduced level and the spouse qualifies as a former spouse, the base amount used in calculating any annuity of the former spouse under section 1450 of this title may not exceed the base amount designated under this subparagraph. An election under this subparagraph is irrevocable if not revoked before the end of the 90-day period referred to in such paragraph.

"(C) If a person who is eligible to participate in the Plan has a former spouse, the person and such former spouse may jointly elect by spousal agreement under section 1464 of this title not to participate in the Plan with respect to an annuity under section 1450 of this title for that former spouse if the election is made (i) before the end of the 12-month period after the divorce or annulment involving that former spouse becomes final, or (ii) at the time the person becomes eligible to participate in the Plan, whichever occurs first. Such an election is irrevocable after the expiration of the time described in the preceding sentence for the making of such election.

"(4) Regulations prescribed under section 1455 of this title may authorize a person eligible to participate in the Plan to make an election under paragraph (3) without the person's spouse or former spouse if the person establishes to the satisfaction of the Secretary concerned that the person does not know, and has taken all reasonable steps to determine, the whereabouts of the spouse or former spouse.".

(2) Subsection (b) of such section is amended by striking out "who is not married" and inserting in lieu thereof "who is not married, does not have a former spouse.".

(3) Subsection (d) of such section is amended by striking out "to which the otherwise eligible spouse" and all that follows and inserting in lieu thereof "which the member would have received if he had been eligible for that pay on the day before he died, based upon his years of active service. If such a member has a former spouse at the time of death, the Secretary concerned shall pay to the former spouse an annuity equal to 55 percent of the amount of the annuity which would have been payable to the former spouse under section 1462 if the member had been eligible for retired or retainer pay on the day before he died,

and the annuity of the surviving spouse under the preceding sentence shall be reduced by the amount of the annuity paid to the former spouse.".

(4) Such section is further amended by adding at the end thereof the following new subsection:

"(f)(1) In the case of any person providing an annuity under the Plan for a former spouse—

"(A) such person may elect, or

"(B) a spousal agreement or court order may provide for,

an additional annuity under the Plan for any other former spouse or spouse surviving the person, if the person satisfactorily passes a physical examination as prescribed by the Secretary concerned.

"(2) Neither the total amount of annuity or annuities under this subsection with respect to any person participating in the Plan, nor the annuity or annuities for any one surviving spouse or former spouse of such person under the Plan, may exceed 55 percent of the full amount of the person's retired or retainer pay.

"(3)(A) In accordance with regulations prescribed under section 1455 of this title, the person involved may provide for an annuity under this subsection—

"(i) by a reduction in the retired or retainer pay or an allotment from the basic pay of the person,

"(ii) by a lump sum payment or installment payments, or

"(iii) by any combination thereof.

"(B) The present value of the total amount to accrue to the United States under subparagraph (A) to provide an annuity under thi subsection shall be actuarially equivalent in value to such annuity, as calculated upon such tables of mortality as may from time to time be prescribed for such purpose under section 1455 of this title.

"(C) If a former spouse predeceases the person involved or remarries before attaining age 60 (or, in the case of a spouse, the spouse does not qualify as a former spouse upon dissolution of the marriage)—

"(i) if a reduction in retired or retainer pay or allotment of basic pay under subparagraph (A) is in effect for that spouse or former spouse, the retired or retainer pay shall be recomputed and paid as if it had not been reduced or the basic pay allotment terminated, as the case may be, and

"(ii) any amount accruing to the United States under subparagraph (A) shall be refunded, but only to the extent that such amount may have exceeded the actuarial cost of providing benefits under this subsection for the period such benefits were provided, as determined under regulations prescribed under section 1455 of this title.

"(D) Under regulations prescribed under section 1455 of this title, retired or retainer pay shall be recomputed (or an allotment of basic pay terminated or adjusted), and a refund provided (if appropriate), in a manner comparable to that provided under subparagraph (C), in order to reflect a termination or reduction of future benefits under this subsection for a spouse in the event a former spouse of the person involved dies or remarries before attaining age 60 and an increased annuity is provided for that spouse in accordance with this chapter.

"(4) An annuity payable under this subsection to a spouse or former spouse shall commence on the day after the person dies and shall terminate on the last day of the month before the spouse or former spouse's death or remarriage before attaining age 60.

"(5) Section 1451(c) of this title shall not apply to any annuity under this subsection, unless authorized under regulations prescribed under section 1455 of this title.".

(d) Section 1450 of title 10, United States Code, relating to beneficiaries under the Survivor Benefit Plan, is amended—

(1) in subsection (a)—

(A) in clause (1), by inserting after "or widower" the following: "and any eligible former spouse"; and

(B) in clause (2), by striking out "if the eligible widow or widower is dead, dies, or otherwise becomes ineligible" and inserting in lieu thereof "if the eligible widow or widower and any eligible former spouse are dead, die, or otherwise become ineligible";

(2) in subsection (b), by inserting "or former spouse" after "widow or widower" each place it appears; and

(3) by striking out the first two sentences of subsection (e) and inserting in lieu thereof "If no annuity under this section is payable to a widow

or widower because of subsection (c), any amount deducted from the retired or retainer pay of the deceased under section 1452 of this title shall be refunded to the widow or widower. If, because of subsection (c), the annuity payable to the widow or widower is less than the amount established under section 1451 of this title, the annuity shall be recalculated under that section.".

(e)(1) Paragraph (1) of subsection (a) of section 1451 of title 10, United States Code, relating to the amount of annuities under the Survivor Benefit Plan, is amended to read as follows:

"(1)(A)(i) Subject to paragraphs (2) and (3), the monthly annuity payable to a widow or widower who is entitled under section 1450(a)(1) of this title to an annuity shall be—

"(I) 55 percent of the base amount, as adjusted from time to time under section 1401a of this title, if the annuity is provided by virtue of eligibility under section 1448(a)(1)(A) of this title; or

"(II) a lesser percentage (determined by the Secretary of Defense in accordance with subsection (d)) of the base amount, as adjusted from time to time under section 1401a of this title, on or after the date the person becomes entitled to retired pay under chapter 67 of this title, if the annuity is provided by virtue of eligibility under section 1448(a)(1)(B) of this title.

"(ii) Notwithstanding clause (i), the amount of an annuity calculated under clause (i) for a widow or widower in a case in which there is also a surviving former spouse who qualifies for an annuity under section 1450(a)(1) of this title may not exceed 55 percent (or the applicable percentage determined in accordance with subsection (d)) of the portion (if any) of the base amount that remains available under subsection (e)(2).

"(B) Subject to paragraphs (2) and (3), the monthly annuity payable to a former spouse who is entitled under section 1450(a)(1) of this title to an annuity shall be a pro rata share of the amount of an annuity of a widow or widower computed under the first sentence of subparagraph (A)(i).

"(C) The monthly annuity payable to a dependent child who is entitled under section 1450(a) of this title to an annuity shall be—

"(i) 55 percent of the base amount, as adjusted from time to time under section 1401a of this title, if the annuity is provided by virtue of eligibility under section 1448(a)(1)(A) of this title; or

"(ii) a lesser percentage (determined by the Secretary of Defense in accordance with subsection (d)) of the base amount, as adjusted from time to time under section 1401a of this title, on or after the date the person becomes entitled to retired pay under chapter 67 of this title, if the annuity is provided by virtue of eligibility under section 1448(a)(1)(B) of this title.".

(2) Paragraph (2) of such subsection is amended by inserting "female former spouse" after "widow" both places it appears.

(3) Paragraph (3) of such subsection is amended by striking out "widow or widower" each place it apears and inserting in lieu thereof "widow, widower, or former spouse".

(4) Subsection (c) of such section is amended by striking out "section, or section 1448(d) of this title," and inserting in lieu thereof "subchapter".

(5) Such section is further amended by adding at the end thereof the following new subsection:

"(e)(1) Except for an annuity provided by virtue of section 1448(f) of this title, the maximum annuity or combination of annuities under this section (or under section 1448(d) of this title) with respect to any member or former member may not exceed 55 percent of the full amount of the member or former member's retired or retainer pay.

"(2) Once an annuity has been provided for under the Plan for any former spouse, an annuity may thereafter be provided for under the Plan with respect to a member or former member only for that portion (if any) of the maximum base amount of the member or former member which is not committed for survivor benefits for any former spouse whose prospective right to such annuity has not terminated by reason of death or remarriage.".

(f) Section 1452 of title 10, United States Code, relating to reductions in retired or retainer pay, is amended—

(1) in subsection (a)—

(A) by striking out "a spouse and a dependent child" in the first sentence and inserting in lieu thereof "a former spouse" and by in-

serting "and former spouse (if any)" after "in favor of his spouse";

(B) by inserting "or an eligible former spouse and a dependent child" in the second sentence after "an eligible spouse and a dependent child"; and

(C) by inserting "or former spouse" in the third sentence after "eligible spouse";

(2) in subsection (b), by inserting "or former spouse" after "spouse" each place it appears;

(3) in subsection (e), by inserting "or former spouse" after "spouse"; and

(4) by adding after subsection (h) the following new subsection:

"(i)(1) For each full month after a former spouse of a member or former member dies or remarries before attaining age 60, the retired or retainer pay of the member or former member, if reduced to provide an annuity for the former spouse under the Plan, shall be recomputed and paid as if the annuity had not been so reduced, unless an election is in effect under paragraph (2).

"(2) Subject to section 1451(e) of this title, the member or former member may elect in writing within one year after receipt of notice of the death or remarriage of the former spouse to continue the reduction in order to provide a higher annuity under the Plan for a spouse of the member or former member.".

(g) Section 1455 of title 10, United States Code, relating to regulations to carry out the Survivor Benefit Plan, is amended—

(1) by inserting "and subchapter III of this chapter" after "this subchapter";

(2) by striking out paragraph (1) of such section and inserting in lieu thereof the following:

"(1) provide that the member and the spouse and former spouse (if any) of the member shall, before the date the member becomes entitled to retired or retainer pay, be informed of the elections available under section 1448(a) of this title and the effect of such elections; and".

(h)(1) Any member of the uniformed services who on the effective date of this Act has a former spouse shall receive retired pay at a reduced rate and provide a survivor annuity for such former spouse under subchapter II of chapter 73 of title 10, United States Code, as amended by this Act, if—

(A) the member so elects by means of a spousal agreement, or

(B) a court order so provides.

(2)(A) If the member has not become entitled to retired pay on or before the effective date of this Act, an election under subsection (h)(1)(A) may be made, or a court order under subsection (h)(1)(B) may be issued, at any time before the member becomes so entitled.

(B) If the member is entitled to retired pay on or before the effective date of this Act, an election under subsection (h)(1)(A) may be made, or a court order under subsection (h)(1)(B) may be issued, within such period after such effective date as the Secretary concerned may prescribe.

(C) In any case in which a member is married and has been married for more than one year, an election under subsection (h)(1)(A) may only be made with the written concurrence of the spouse of the member.

(D) For purposes of applying chapter 73 of title 10, any such election or court order shall be treated the same as if it were a spousal agreement or court order under section 1464 of such title.

(3)(A) An election under subsection (h)(1)(A) may provide for a survivor benefit based on all or any portion of that part of the retired pay of the member which is not designated or committed as a base amount (as such term is defined in section 1447(2) of such title) for survivor benefits for a spouse or any other former spouse of the member. The member and the spouse of the member may make an election under paragraph (3) of section 1448(a) of such title before the member becomes eligible to participate in the Survivor Benefit Plan under such section for the purpose of allowing survivor benefits to be provided under this subsection.

(B) A court order under subsection (h)(1)(B) may provide for an annuity for a former spouse which does not exceed that former spouse's pro rata share of 55 percent of the full amount of the retired pay of the member.

(4) The amount of the reduction in the retired pay of the member under this subsection shall be determined in accordance with section 1452 of such title and shall be effective as of—

(A) the commencing date of the retired pay in the case of an election under subsection (h)(2)(A); or

(B) the effective date of this Act, in the case of an election under subsection (h)(2)(B).

(5) In the case of a member who died before the effective date of this Act after becoming entitled to retired pay and who—

(A) at the time the member became entitled to retired pay was married and did not elect not to participate in the Survivor Benefit Plan;

(B) subsequently was divorced from the spouse who was the member's beneficiary under the Survivor Benefit Plan at such time; and

(C) died without a beneficiary under the Survivor Benefit Plan,

the individual to whom the member was married at the time the member became entitled to retired pay shall be entitled to an annuity under the Survivor Benefit Plan as if married to the member at the time of death if the individual is qualified as a former spouse.

(6) For the purposes of this subsection:

(A) The terms "former spouse", "spousal agreement", "court order", and "State court" have the meanings given such terms in section 1461 of title 10, United States Code.

(B) The terms "uniformed services" and "Secretary concerned" have the meanings given such terms in section 101 of title 37, United States Code.

(C) The term "member" includes a former member entitled to retired pay.

(D) The term "retired pay" includes retainer pay.

(i)(1) This section and the amendments made by this section shall take effect at the end of the 120-day period beginning on the date of the enactment of this Act.

(2)(A) Subchapter III of chapter 73 of title 10, United States Code, as added by this section, shall apply in the case of any individual who after the effective date of this section becomes a former spouse (as defined in section 1461(1) of such title) of an individual who becomes entitled to retired or retainer pay after the effective date of this section.

(B) Except to the extent provided in subsection (h), the provisions of the Survivor Benefit Plan (subchapter II of such chapter) regarding the rights of former spouses to receive survivor annuities shall apply in the case of any individual who after the effective date of this section becomes a former spouse (as defined in section 1461(1) of title 10, United States Code) of a member or former member of the uniformed services.

S. 1814

A bill to amend title 10, United States Code, to require the Secretary concerned to comply with the terms of certain court orders in connection with the divorce, dissolution, annulment, or legal separation of a member or former member of a uniformed service and which affect the retired or retainer pay of such a member or former member, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 71 of title 10, United States Code, is amended by adding at the end thereof the following new section:

"§ 1408. Payment of retired or retainer pay in compliance with court orders

"(a) In this section:

"(1) 'Court' means a court of competent jurisdiction of a State, the District of Columbia, or the Commonwealth of Puerto Rico.

"(2) 'Court order' means a court's final decree of divorce, dissolution, annulment, or legal separation, or a court ordered or court approved property settlement incident to such decree, which provides for—

"(A) payment of child support;

"(B) payment of alimony; or

"(C) division of property (including a division of community property),

which is issued in accordance with the laws of the jurisdiction of such court and which expressly provides for the monthly payment of a specified amount of the retired or retainer pay of a member to the spouse or former spouse of such member. For purposes of this definition, 'final decree' means a decree from which no appeal has been taken within the time for taking such an appeal under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

"(3) 'Creditable service' means service credited to a member for the purposes of determining such member's eligibility for retired or retainer pay under this title and titles 33 and 42.

"(4) 'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled under the provisions of this title (other than chapter 61 of this title) and titles 33 and 42 less amounts which—

"(A) are owed by such member to the United States:

"(B) are required by law to be, and are deducted from the retired or retainer pay of such member, including but not limited to fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

"(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

"(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

"(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

"(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

"(5) 'Member' means a person who is or was appointed or enlisted in, or conscripted into, a uniformed service, and includes a former member of a uniformed service.

"(6) 'Secretary concerned' has the meaning given to that term by section 101(5) of title 37.

"(7) 'Spouse or former spouse' means the husband or wife, or former husband or wife, of a member who, on or before the date of a court order, had been married to that member for a period of at least 5 years during which period the member performed at least 5 years creditable service.

"(8) 'Uniformed services' has the meaning given to that term by section 101(3) of title 37.

"(b) Subject to the limitations of this section, the Secretary concerned, not later than 90 days after the effective service of a court order or not later than 90 days after the member whose retired or retainer pay is affected by such order first becomes entitled to receive retired or retainer pay, whichever is later, shall pay from the disposable retired or retainer pay of a member to the spouse or former spouse of that member the amount expressly specified in that court order. Such payments shall be made no more often than once a month. Payments under this section, in any event, shall terminate not later than upon the death of the member or upon the death of the spouse or former spouse, whichever occurs first.

"(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay either as property solely of the member or as property of the member and his spouse, in accordance with the law of the jurisdiction of such court.

"(2) Notwithstanding any law, under this section no right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) shall exist in a spouse or former spouse.

"(3) The total amount of the disposable retired or retainer pay of a member which is subject to court order or orders under this section shall not exceed 50 percent of such pay.

"(4) Nothing in this section shall permit any court to order or direct that a member shall retire at a particular time in order to effectuate any payment under this section.

"(d)(1) Effective service of a court order under this section shall be accomplished by certified or registered mail, return receipt requested, or by personal service, upon the appropriate agent designated for receipt of such service under regulations prescribed under subsection (g), or if no agent has been designated for the uniformed service concerned, then upon the Secretary concerned. For

service of a court order to be effective, such order must be regular on its face and, on its face or through accompanying data, permit prompt identification of the member involved.

"(2) In the event of effective service of more than one court order for payment to more than one spouse or former spouse from the disposable retired or retainer pay of one member, such pay shall be used to satisfy, subject to the limitations of subsection (c)(3), such court orders on a first-come-first-served basis. Such court orders shall be satisfied out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

"(3) In the event of effective service of conflicting court orders for the payment to one spouse or former spouse from the retired or retainer pay of one member, the Secretary concerned shall determine under which order payment shall be made and his determination is final and not subject to any judicial review.

"(4) A court order which provides for the payment of an amount of disposable retired or retainer pay which exceeds the amount of such pay available for payment because of the limit set forth in subsection (c)(3), or which because of previously served court orders provides for payment of an amount of disposable retired or retainer pay which exceeds that amount available for payment, shall not be deemed to be irregular on its face solely for that reason. However, such order shall be deemed to be fully satisfied under this section by the payment to the spouse or former spouse of the amount of disposable retired or retainer pay available for such payment.

"(e) The United States and any officer or employee thereof shall not be liable with respect to any payment made from moneys due or payable from the United States to any member, spouse, or former spouse pursuant to a court order regular on its face, if such payment is made in accordance with this section and regulations prescribed to carry out this section.

"(f) Whenever any person designated to accept service of court orders under this section is effectively served with any such court order, such person, as soon as possible but not later than 30 days after the date effective service is made, shall send written notice of such court order (together with a copy thereof) to the member affected at his last known address.

"(g) The Secretary concerned shall prescribe regulations to administer this section within the uniformed services under his jurisdiction.".

(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following new item:

"1408. Payment of retired or retainer pay in compliance with court orders.".

SEC. 2. Chapter 55 of title 10, United States Code, is amended as follows:

(1) Section 1072(2) is amended—

(A) by striking out "and" at the end of subparagraph (D);

(B) by striking out the period at the end of subparagraph (E) and inserting in lieu thereof "; and"; and

(C) by adding at the end thereof the following new paragraph:

"(F) for a period of 90 days following the date of a final decree of divorce, dissolution, or annulment of a marriage to a member or former member, the unremarried former spouse if, on the date of the such final decree of divorce, dissolution, or annulment, that former spouse had been married to the member or former member for a period of at least 20 years during which period the member or former member performed at least 20 years of service which is creditable in determining that member's or former member's eligibility for retired or retainer pay, or equivalent pay, as a result of his service in a uniformed service.

The 90-day period described in subparagraph (F) during which medical and dental care may be provided to persons described in such subparagraph, may be extended by the Secretary of the uniformed service concerned so as not to exceed three years, but only for medical conditions of the former unremarried spouse which existed prior to the end of such 90-day period and for which treatment had been provided under this chapter prior to the end of such 90-day period.".

(2) Section 1076(b)(2)(B) is amended by inserting "(except that the requirement of this subclause shall not apply with respect to a dependent described in section 1072(2)(F) of this title)" after "chapter 73 of this title".

(3) Section 1079 is amended—

(A) by striking out "and children" in the section heading and inserting in lieu thereof ", children, and certain former spouses"; and

(B) by striking out "and children" in the first sentence of subsection (a) and inserting in lieu thereof ", children, and certain former spouses (as described in section 1072(2)(F) of this title)".

(4) The section headings of sections 1080, 1081, and 1083 are each amended by striking out "and children" and inserting in lieu thereof ", children, and certain former spouses".

(5) The items relating to sections 1079, 1080, 1081, and 1083 in the table of sections at the beginning of such chapter are each amended by striking out "and children" and inserting in lieu thereof ", children, and certain former spouses".

SEC. 3. Subchapter II of chapter 73 of title 10, United States Code, is amended as follows:

(1) Section 1447 is amended by adding at the end thereof the following new paragraph:

"(6) 'Former spouse' means the surviving former husband or wife of a person who is eligible to participate in the Plan if such former husband or wife was married to such person during any period of service which is creditable for the purpose determining such person's eligibility for retired or retainer pay.".

(2) Section 1448 is amended—

(A) in subsection (a)(2), by inserting ", has a former spouse," after "is married" each place it appears; and

(B) in subsection (b), by inserting "or a former spouse" after "interest in that person".

(3) Section 1450(a)(4) is amended by inserting "former spouse or other" before "natural person".

SEC. 4. Subsection (a) of section 459 of the Social Security Act (42 U.S.C. 659(a)) is amended by adding at the end thereof the following new sentence: "However, no moneys payable to a member or former member of a uniformed service as retired or retainer pay for any period during which payment in any amount is made from such moneys to any spouse or former spouse under section 1408 of title 10, United States Code, shall be subject to legal process served under this section.".

SEC. 5. (a) The amendments made by this Act shall take effect at the end of the one-hundred-and-twenty-day period beginning on the date of enactment.

(b) The amendments made by the first section of this Act shall apply only to payments from retired or retainer pay which is payable for months beginning on or after the effective date.

(c) The amendments made by section 2 of this Act shall apply to former spouses eligible for health care under those amendments regardless of the date of the final decree of divorce, dissolution, or annulment of such a former spouse's marriage to a member or former member of a uniformed service.

(d) The amendments made by section 3 of this Act shall apply only to persons who become eligible on or after the effective date to participate in the survivor benefit plan.

(e) The amendments made by section 4 of this Act shall apply to all moneys payable to a member or former member of a uniformed service as retainer pay for any period beginning on or after the effective date regardless of the date of the service of any legal process affecting that pay under section 459 of the Social Security Act (42 U.S.C. 459).

OPENING STATEMENT BY SENATOR ROGER W. JEPSEN, CHAIRMAN

Senator JEPSEN. The meeting will come to order, please. The purpose of this hearing today is to receive testimony on several proposals before the committee related to benefits for former spouses of military retirees.

These proposals are especially timely in light of the *McCarty* v. *McCarty* decision that was rendered by the Supreme Court in June.

The central issue raised by the Court was whether military retirement was to be considered a personal entitlement of the service member; is it necessary for the Federal Government to preempt the States

in order for the retirement to be preserved as a management tool for recruitment and retention; and whether it is a level of protection to be afforded to the former spouse of a retired service member.

In order to put this issue into proper perspective let us first touch upon the differences between the problems experienced by former spouses of military members and the problems of former spouses in general.

One of the strongest points made to a military spouse from the time her husband chooses to join the armed services is her role as a partner in her husband's career. She is expected to fulfill an important role in the social life and welfare of the military community to care for the children and support her service member spouse as they share the rigors of military life.

These rigors include frequent changes of station, long separations from one another and varying living conditions from place to place. Because of the frequent moves and the special pressure placed on the military wife as a homemaker it is extremely difficult for her to pursue a career. In fact, she often foregoes any opportunity to acquire job skills or pension protection. This sacrifice is indicative of the level of commitment of the military spouse to her husband and her family.

This lack of security that military spouses face was underscored recently by the Supreme Court's decision in the case of *McCarty* v. *McCarty*. In June the Court stated that "Under the construction of the current status Federal law preempts the States from considering a military retirement pension as community property in the divorce settlement."

There are currently four pieces of legislation which address this issue. Senate bill 888 introduced by Senators Durenberger and Hatfield and its companion in the House, H.R. 3039 introduced by Representative Schroeder would set guidelines for the State and local courts that a portion of the member's retired pay could be assigned to a former spouse based on the number of years of military service and the number of years of marriage by the members in the military. The marriage would have to last at least 10 years.

H.R. 1711, introduced by Representative Hance, mandates that in the event of a court awarded payments from a Federal retirement pension payments should be issued directly to a spouse from the Secretary of the Department involved.

Senate bill 1453, introduced by Senator DeConcini, would give the State courts the legal right to consider a retirement pension as community property in a divorce settlement.

As chairman of this subcommittee I have been concerned about the serious problem of retention of skilled personnel in the armed services. This problem has been addressed to a great extent by Senate bill 1181, the Jepsen/Exon pay bill. This legislation deals directly with pay and benefit increases for members of the armed services.

In attempting to solve the retention problem we must be mindful of the role of a military spouse, not only in the support of the role mentioned above, but also as an adviser to the service member deciding on whether to remain in the service. A spouse who is guaranteed some form of security is much more likely to urge the member to remain in the military.

However, we must also ascertain the impact that these legislative proposals will have on the service member's decision to make a career in the armed services.

In his dissenting opinion on the *McCarty* decision Justice Rhenquist argued that:

> Current law in no way expressed the deliberate purpose of Congress that the courts should not award any part of a military retirement pension to a former spouse in a divorce settlement. Nonetheless, Congress may well decide, as it has in the Civil Service and Foreign Service context, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone.

In the interest of the family and in the interest of a strong military and in the interest of equity we must clarify our position with all deliberate speed on this.

So with that, and before I recognize the very distinguished Senators who are going to testify here, I will defer to Senator Exon. Do you have any opening remarks, Senator?

Senator EXON. Thank you, Mr. Chairman.

I want to thank you for calling this hearing. The problem of whether or not to consider military retirement pay as a subject of the community property law and divorce has been festering in the judicial system for a long time.

As you have stated, Mr. Chairman, last June 26 the Supreme Court ruled in *McCarty* v. *McCarty* that the Federal military pay laws preempted the California State law treating military retirement pay as community property. This ruling prevents the courts from awarding any portion of military retirement pay as a community property to a former spouse of a militay member in the future.

In reaching this decision the court held that the intent of the Congress was that military retirement pay should not be divided in divorce cases. In longstanding tradition the court has deferred to congressional intent in matters concerning military policy. However, the question has been raised as to whether the Congress had ever explicitly addressed the relation of military retirement pay to community property laws.

Mr. Chairman, it seems to me that the purpose of today's hearing is to hear from the public, the Department of Defense and other Members of Congress on how and whether this issue should be formally addressed. Many of these witnesses feel that the time has come for the committee to address this issue with particular legislation.

The issue at hand, it seems to me, is understandably an emotional one and there are no easy solutions. The issue of the staggering divorce rates, particularly the effect that those divorces have on children of such marriages, are the most important concern to at least this Senator.

I want to pledge my assistance to help the chairman and the other members of this subcommittee and the full Committee on Armed Services in seeing whether or not this matter should be addressed.

I am looking forward with great interest to the testimony of not only our colleagues but others that we are going to hear from this morning.

Thank you very much.

Senator JEPSEN. I thank you.

Now it is my honor to recognize my distinguished colleagues, Senators Hatfield and DeConcini. Both are concerned, compassionate and very able Senators.

I assume from the way you are positioned, Senator Hatfield, you are going to proceed on your proposal first and then Senator DeConcini. Is that agreeable?

Senator HATFIELD. Yes.

Senator JEPSEN. You honor this committee, Senator, by appearing here and you may proceed and welcome.

STATEMENT OF HON. MARK HATFIELD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator HATFIELD. Thank you very much, Mr. Chairman and Senator Exon.

May I say just as a preliminary remark that back in 1978 I offered an amendment to amend the Foreign Service Act of this Nation to address this precise problem as it related to the wives of Foreign Service officers.

I think we have some fairly good experience in that period of time in which that amendment which was adopted has operated. I would only raise that as a point of information for this committee in its considerations that you may wish to refer to the experience under the Foreign Service Act amendment on this same subject matter.

Second, I would like to as a preliminary comment say that back in the springtime a number of us introduced a total economic package as it related to bringing equity between the sexes, particularly as it related to women in various pursuits of life, as wife, as homemaker, as professional, whatever her pursuit may be.

This amendment that I have now reintroduced has been extrapolated from that total economic package. So I wanted to identify this amendment in that context as well.

Gentlemen, I don't think I have to give a long litany this morning about the fact that the traditional family unit, composed as husband as breadwinner and wife as homemaker, has had a very dramatic change within a 20-year period, and that is a relatively short period of time when you consider the impact of this family structural change.

In the typical family setting the husband provided the economic support and in turn the wife nurtured the children and cared for the home. It was and continues to be, I believe, a very excellent social contract. But it is this contract which for many families has been breaking down, as Senator Exon has observed.

It is no secret that over one-half of all marriages end in divorce today. Particularly hard hit among that group are women who have relied on that social contract for their economic support and are lost without it. I regret to say that it is these older women who have spent the productive years of their lives as caring wives and mothers and active homemakers who are now part of the fastest growing poverty group in America.

Two-thirds of the Nation's poor are women. And 81 percent of women over 65 not living with relatives live below the poverty line.

It is no wonder that many homemakers upon divorce face serious economic hardships. If they are depending on alimony, most divorced

women are sorely disappointed. For only 4 percent of the Nation's 4.5 million divorced women receive it, and only 22 percent receive child support in spite of the fact that in 90 percent of the cases wives are awarded the custody of the children.

When these so-called displaced homemakers who find themselves widowed or divorced seek outside employment they discover their skills go unwanted or are meagerly paid. Even those women who have worked outside the home during the marriage discover real economic hardships. For the average worker who earns only 59 cents for every dollar earned by a male in like category this represents real discrimination.

It is tragic to realize that despite these grave economic realities the plight of the widowed or former spouse of the military employee may be even more serious.

For the military spouse is often more dependent on the traditional social contract than the civilian spouse. Frequent moves during military service prevent a military wife from establishing a career and earning accompanying retirement benefits.

Despite her unique contributions to the military family, under current law a woman is not eligible to receive any portion of her ex-husband's military pay or survivor's benefits even if he wishes to provide them for her.

Many of these women find that the retiree walks away from the divorce with a full retirement plan and health insurance while the spouse walks away with nothing. If the employee in the military or civil service remarries the spouse automatically becomes eligible for medical and survivor benefits, even if she has put no time into the spouse's military/civil service career.

Let me digress a moment to illustrate the point that brought this to my attention under the Federal Foreign Service Act.

There was an ambassador who had been married to this woman for 22 years and divorced her and remarried and in 1 year was killed, but his new wife of 1-year's standing received all of the benefits and his wife of 22-year standing who had been on the field working side by side helping to build his career to a post of ambassadorship received nothing.

If, indeed, we are to strengthen incentives for participation in the military, as the chairman and Senator Exon have both commented, we cannot continue such economic disincentives for the wife of the military employee.

Mr. Chairman and Senator Exon, the Military Spouse Equity Income Act redresses these inequities in current law. This legislation is already a part of the Economic Equity Act, as I have observed, a bill which my colleagues Senator Durenberger and Senator Packwood, as well as 20 others Members of the Senate introduced earlier this year. As I have said, this is an extrapolation from that bill.

The Military Retirement Equity Income Act was developed by my able colleague in the House, Congresswoman Pat Schroeder, who will also be testifying today. It was through her leadership that a similar provision affecting former spouses of Foreign Services officers was enacted in 1978.

Briefly the legislation would do the following:

No. 1, entitle women who were married to civil service or military employees for at least 10 years the right to a pro rata share of the benefits earned during marriage. This provision is subject to court review and modification, depending on the divorce settlement. It no way binds the court in that sense if there are other incomes or other pension benefits and the court may make modification.

No. 2, it mandates survivor's benefits unless the spouse and former spouse choose to waive receipt of such. Currently a military employee may opt out of survivor's benefits already agreed to without notification of the spouse or former spouse. This legislation required that a military employee and spouse or former spouse, if any, agree in writing to forego the survivor's benefit plan. So notification actually is basically what it is.

These proposals will not cost the taxpayer additional moneys. Rather, they will allow a fair distribution of retirement and survivor's benefits between the partners in marriage.

Morale, motivation, and reenlistment of our armed services depend on more than take-home pay. Long-range benefits which insure the future financial security of both partners in a military marriage will improve morale and increase reenlistment it is my belief.

The current situation devalues the contribution of military spouses, especially the role of most military women as wife and homemaker, and tells her that all the years of moving, volunteer work, child raising, and emotional support for her husband and family do no merit any recompense. The *McCarty* decision reinforces this devaluation.

It is ironic that these outdated laws have been hardest on the woman who devotes herself entirely to the role of mother and homemaker. The concept of marriage as an economic partnership is a critical one. If Congress does not reaffirm the jurisdiction of the State courts to view pensions as a legitimate property right, marriage and homemaking will become an even riskier choice of career.

I urge the committee to carefully review these issues and promptly report out legislation which grants her a fair share of the military pension and a right to be considered in the awarding of the survivor's benefits.

I feel very comfortable this morning appearing before this subcommittee because I know of the deep concern that you two gentlemen have demonstrated in the general area of military pay and other matters relating to military life in providing for incentives as well as for the proper support of military personnel.

I am only asking that this amendment or some similar legislation be considered by this committee as a broadening of that concern base for the entire Congress to act upon.

Thank you very much.

Senator JEPSEN. Thank you, Senator.

Senator EXON. I have one question of Senator Hatfield, if I could.

Senator, in your opinion, has the Congress ever explicitly addressed the relationship of military retired pay and benefits? Was that the intent of the previous Congresses and was the decision of the Court correct in their interpretation of the intent of Congress?

Senator HATFIELD. Senator, I am without credentials to comment on the Court's ruling in terms of legal training and not being an attorney. I believe that the Court probably, as it has on frequent

occasions, took a narrow interpretation or imposed upon this case a narrow viewpoint or strict construction in the terms of the legal profession.

I do not believe it was a matter of the Court's inaccuracy as much as probably it was not a conscious action on the part of the Congress or, nor was it a matter that we probably were that much aware of these inequities or that there was any legislative record or any legislative history that addressed specifically the role of the spouse and the right of the spouse to that pension or part of that benefit that accrued to her husband.

I think it is a matter that has really only evolved out of the recent social consciousness that we have in many fields where women have been discriminated against, not necessarily in this age by design as much as by inheritance of an inculturated pattern that we have followed without even thinking.

It reminds me much about some who were never aware of race problems because they were never conscious of race distinctions unless they were part of that racial minority who lived in that inculturated lifestyle or pattern.

So I don't think that the Court necessarily was right or wrong in terms of what the legislative intent was, but I think we now have the responsibility in light of this action by a couple of Oregonians who represent the *McCarty* case to address this very specific matter as the Court has forced it upon us.

That was one reason why we introduced the total economic package—to address this in total of many areas—because even if this committee in its wisdom should seek to amend this act and right this inequity, my dear friends, there are many other areas in the country today in social relationships where women are still being treated as second-class citizens which caused some of us to support the ERA as one action to get to all of these problems. But then in failing in that we feel that we must move ahead piecemeal on an ad hoc basis one item at a time or a package like our economic package.

So I would not be, as I say, presumptuous to comment on the Court's accuracy or inaccuracy. I do know that inequity is there and now as a legislative body we have the responsibility to correct it.

Senator EXON. Mr. Chairman, we find ourselves in a unique situation. There are four Senators in the room this morning and only one lawyer. Depending upon your point of view, that is either good or bad. But I happen to see the man seated immediately to your right is a very distinguished lawyer, a good friend and distinguished U.S. Senator.

I am still curious as to whether or not those of you who have studied this issue feel that the Court was correct in the decision that we have referred to.

Would you care to comment on that, Senator DeConcini?

Senator DECONCINI. Mr. Chairman and Senator Exon, I think the Court was incorrect. I have not done a thorough research, but I cannot find where Congress has spoken to this subject specifically. Now, they have spoken in the area of railroad retirement under the Railroad Retirement Act and there has been an interpretation and many references to that act in the *McCarty* case.

You could draw the conclusion that the Court has properly made interpretations of the Railroad Retirement Act, but in the *McCarty* case it seems to me because Congress had not spoken in this area it would have been the proper decision, in my judgment, to leave it to the States. The Court elected not to do that based on the fact that they had preempted the States I think six different times, one of them being the Railroad Retirement Act in the *Esquido* case.

Senator EXON. Is it your opinion, Senator DeConcini, that the breadth of the *McCarty* decision, unless corrected, will prevent a ruling by any judge in any State from awarding to a spouse a portion of the military member's retired pay?

Senator DECONCINI. Yes, sir, Senator Exon, I think it is very clear that it does just that.

Senator EXON. So what you are saying is that it is your opinion that unless correction is made after the *McCarty* decision, right, wrong, or indifferent, it is going to stand. The position now is that the divorced woman has no rights under the interpretation of the law in the decision that we have referred to?

Senator DECONCINI. That is correct, Senator Exon. I think the Court made it very clear that the distribution of property in a marriage settlement is no longer to be decided by the State and that is what I am sure has prompted Senator Hatfield's very fine legislation, by the way, and mine which is just a bit more specific dealing with this single issue.

Senator EXON. I might say the chairman will be back in a moment. Would you proceed with your comments, Senator DeConcini.

Is there anything you would like to add, Senator Hatfield, before you leave?

Senator HATFIELD. No; I just want to thank the Senator again. If the Senator will excuse me to go to another committee, I will.

Senator EXON. Thank you. We are all in the same boat. Thank you, Senator Hatfield. We appreciated your testimony very much.

Senator DeConcini.

STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman and Senator Exon, I am pleased to be here with Senator Hatfield, a leader in this area, indeed.

I want to thank the chairman, even in his absence right now, and I know it is temporarily, for his concern as expressed in his opening statement and his commitment here and certainly yours, Senator Exon, for being a leader to face these difficult problems head on and hopefully in a very rapid manner.

I would like to thank you for your consideration of this issue which is of great importance to former military spouses whose lives have been greatly affected by the recent U.S. Supreme Court decision in the *McCarty* v. *McCarty* case.

One of the bills before you, S. 1453, which I introduced on July 8, 1981, provides that the division of property and retirement benefits of members of our Armed Forces upon dissolution of a marriage shall be governed exclusively, and let me emphasize exclusively, by the law of the State in which the proceedings take place.

This bill deals with the problem raised in case decision which held that Federal law has preempted this area and that a State court is precluded from dividing military nondisability retirement pay pursuant to State community property laws.

Historically matters relating to the family and property have been recognized as matters of State concern, and I certainly think properly so. The disposition of military retirement benefits involved no special issue which justifies removing this local matter to the Federal level.

As Justices Rhenquist, Steward, and Brennan noted in their dissent in the *McCarty* decision, and I would to quote just shortly:

> **Questions concerning the appropriate disposition of property upon the dissolution of marriage * * * are particularly within control of the States, and the authority of the States should not be displaced except pursuant to the clearest direction of Congress.**

The deference to State law to disposition of property is emphasized by the fact that there have been only six occasions in the entire history of this Nation in which Federal law has been held to have preempted State law in the area of property distribution. Two of these cases have been decided in the last 2 years. As Justices Rehnquist, Brennan, and Steward noted, there is no reason that military retirement benefits should be one of those rare exceptions.

I firmly believe that the State courts have the proper forum for the disposition of property upon the dissolution of a marriage. The bill which I introduced confirms the traditional jurisdiction of the State courts in the disposition of all property of the parties, including military retirement benefits.

The *McCarty* decision which found a Federal preemption of this right of disposition of military retirement benefits effectively means that the retirement benefits of a former member of the armed services goes solely to that member unless the member elects another annuity disposition program. This could easily result in ex-spouses receiving nothing and in fact has from what may be the sole major material asset in many cases. My constituents have expressed greater concern, having many retired and active military personnel in Arizona. My State is no great exception. I think it is true across this land.

One of the reasons given for this special treatment of the service member is that it is an incentive for individuals to stay in the military until retirement age and then retire immediately thereby keepng a youthful military. This is a sound reason, but what of all the rhetoric we hear about the value of the military spouse to the serviceman?

It is my contention that a spouse makes a significant contribution toward the member's lifestyle and ability to work. This contribution should not be forgotten. It should have some legal bearing and some rights.

It seems to me that a spouse who is secure in the knowledge of his or her entitlement to a portion of the member's retirement benefit is likely to be more supportive of that member, encourage the member to participate in the military until retirement age and generally add to the stability of the military family.

Instead a spouse in the post-*McCarty* era aware that the retirement pay will go solely to the service member and that they will be entitled to nothing may, rather than urge their spouse to remain in the armed services, urge them to enter another calling where almost certainly

retirement pay will be governed by the State laws in the event of a dissolution of marriage.

It is essential that Congress make a clear determination of whether State law shall govern the division of assets in a marriage dissolution or whether Congress concurs with the *McCarty* decision finding that Congress preempts the States on the issue of division of military retirement benefits.

I firmly believe that we should return jurisdiction over this issue to the States where it historically and rationally belongs.

I want to thank the chairman for his question because I think it is most appropriate. The question was did the Court have reason? Well, the Court always has reason. I think that we have a real disagreement here and it is up to us in Congress, in my judgment, and that is why I thank Senator Exon and Chairman Jepsen for conducting these hearings. This is a serious matter and something that we can't just let float by us today because of the press of economic cutbacks or economic tax breaks or what have you.

This affects people's lives on a daily basis and will continue to do so until Congress acts.

Thank you.

Senator EXON. Senator, being a lawyer, maybe you can straighten out something for me. This *McCarty* decision, as I understood it, had nothing to do directly with child support payments but merely with the rights of the spouse not having any of the retirement benefits; is that correct?

Senator DECONCINI. That is correct.

Senator EXON. One of the criticisms that some people have toward your bill is that it might encourage the spouses to shop around for the best State. I would just like to give you an opportunity to respond to that. I assume that you think that is not a legitimate criticism?

Senator DECONCINI. Well, you have to be a resident to file an action under most State laws. So, of course, the spouse could wait until they changed and become a resident or they could go back to a prior residence and file where it may be a little bit more advantageous, and I don't know that you really want to do anything about that. It seems to me that people should have the right to choose where they want to live and, as a fact, once they make that choice, they should be subject to those laws. If they are more advantageous to the dissolution and the dissolving of community property in the dissolution of a marriage, so be it, but the State is making that judgment for society and for the people that live there.

One of the things that also needs to be addressed, Senator Exon, along this line is that if you did pass this and if the dissolution was, in fact, settled in Arizona and the member of the service moved to another State, would it be necessary for the wife or the ex-wife now, as the case may be, to enforce that to file in the State where the service person had moved. This should be addressed and there are procedures I think that could be put into law that that could be honored by the military, one judgment by a valid State court.

Senator EXON. In layman's terms could you sum up for me the key differences between your approach and that that was suggested by Senator Hatfield?

Senator DeConcini. Well, Senator Hatfield's I think goes further than mine. I have not read the bill and I have no problem with stating that I have not reviewed his bill carefully, but I believe it goes to other things than just the division of the property in a potential divorce or in the dissolution of a marriage. That is my understanding of it.

Senator Exon. If I understand, what you are saying then is that his bill is somewhat more comprehensive in the approach than yours?

Senator DeConcini. That is correct.

Senator Exon. If we do anything on this would there be any merit to a possible combination of the two?

Senator DeConcini. Mr. Chairman and Senator Exon, I agree, I think there would be and I have no pride in authorship. I think whatever this committee comes out with, certainly with you two gentlemen here, I feel very comfortable that you are going to address the problem of the inequities brought to our society now by the *McCarty* case.

Indeed, if the judgment was to combine my bill or to use Senator Hatfield's bill or to report out your own bill because there may be other things that you may want to do or make it part of a package, I would applaud it, applaud it heavily and support it and give you encouragement to act because I think that is what is really important.

Senator Exon. Thank you very much for coming, Senator DeConcini. I appreciate it very much.

Senator DeConcini. Thank you, Mr. Chairman.

Senator Exon. Thank you, Mr. Chairman.

Senator Jepsen. Senator, do you believe that the amount of retirement pay that a State court would award to a ex-spouse should be capped at 50 percent?

Senator DeConcini. Do I believe it should be capped?

Senator Jepsen. Yes.

Senator DeConcini. I like to believe, Mr. Chairman, that State courts are going to address it as they feel is the best in those kinds of situations where you have a divorce. I don't like to see the Federal law preempt and tell a State that they have to cap it at 50 or 40 percent or anything else.

Obviously there will be areas of disagreement where a court may go too far in your judgment or in my judgment, but I am one that prefers the Federal Government to stay out of the States unless it is absolutely necessary.

Senator Jepsen. Senator, would there be a possibility your bill would hurt the retention of skilled and experienced manpower in that if young officers and NCO's know that their prospective benefits which are not large might be subject to division if marital problems arise?

Senator DeConcini. Well, certainly if you look at the divorce rate now, both in the military and outside of the military, what has been going on has been no incentive and the *McCarty* decision I doubt is going to provide any incentive either.

It seems to me what we should do and what should be public policy is to encourage the family unit. It seems to me that under that contractual arrangement that if the spouse that is not in the service feels that there is going to be some consideration in the event that the marriage is dissolved for whatever reason, that there is going to be an

encouragement to keep the person who is in the military in the military retirement system.

It is a good retirement system. It could be improved and we know that, but it is a fine retirement system and has many benefits. Obviously some people go in the military and that is one of the prime reasons. Others find it to be the way of life and it becomes a bonus to them perhaps. But certainly in the marriage contract when the spouse who is not in the military has been part of that family unit, certainly they should not be devoid of any consideration in the unfortunate dissolution and we know that those dissolutions are here and they are imminent until other structural changes are made in our society.

So I would say that I don't think this will have any bearing, Mr. Chairman, of causing any great incentive to have NCO's and commissioned officers leave the service sooner. That is just an opinion. I can't prove it. It is an opinion.

Senator JEPSEN. Let the record show that the questions asked here do not necessarily reflect the opinion of the chairman. I have to do like the television stations do and put a disclaimer on them, but for the record we do want to pull these things out.

I may be a little supersensitive to this because I have, as you know, Senator, sponsored a Family Protection Act which about two-thirds of it deals with just these types of problems and deals with the protection of women who, as Senator Hatfield said, it is ironic that outdated laws have been the hardest on the woman who devotes herself entirely to the role of mother and homemaker.

Senator DECONCINI. That is true.

Senator JEPSEN. You should hear the screams of anguish I get from the feminist community on it. So I want to get some of these things in the record because I think they all relate. If we can just get some of the heat cooled down to where some light can be brought on some of these things we might just do things that are beneficial for everybody all over the country.

Doesn't alimony reflect the contribution made by the nonservice member's spouse to the marriage?

Senator DECONCINI. Does it?

Senator JEPSEN. Yes; as an attorney you should have good ideas on that.

Senator DECONCINI. Yes; I think it is safe that it reflects an attempt to equalize for supposedly the one who will receive the alimony some benefits from the unity of that marriage where there was usually one breadwinner or one person as the main source of income.

Many courts in many States, as you know, have reversed the long trend of only granting alimony to the female part of a divorce and there are many cases that are going in the other direction, but I think that is a safe statement.

Senator JEPSEN. Then one last question, and again I am putting things in the record and I don't necessarily concur with some of the questions, but why can't the State courts rely upon alimony and child support to insure that service members fulfill their responsibility to the ex-spouse with children?

Senator DECONCINI. Well, I think the reasons are several. One is that if you have such an order in the State of Arizona and the couple or the

person in the military moves to another State, it is very difficult to enforce that judgment.

Second, the *McCarty* case, as far as the retirement benefits, excludes the courts for even considering that in the dissolution. The thrust of my bill is to provide that as solely the State jurisdiction.

Your question is one, Mr. Chairman, that could probably deserve a greater answer in depth. I am sure your staff or the Judiciary Committee staff would be more than happy to give you some background on the problems that are faced with enforcement of dissolutioned judgments in other States.

There is a real problem. It is costly, often requiring a lawyer or, if you don't go through a lawyer, of going through the county attorney or the public State attorney and a long period of time of getting the child support or alimony judgment enforced. Many times the person will transfer another time and how many times can you do that before you finally give up.

Senator JEPSEN. There is not a whole lot of security in anticipating what those actions might be is what you are saying.

Senator DECONCINI. Yes, sir.

Senator JEPSEN. I certainly concur.

Senator EXON. One last question, if I might.

Senator DeConcini, if this Congress should decide to make retired pay subject to property distribution, then we come up against the proposition of should this be retroactive or prospective? What is your advice on that?

Senator DECONCINI. Well, that is a very difficult question. Again, if you make it retroactive you certainly attempt to rectify the inequities of the *McCarty* case. That is a judgment I can't call for you. I can only say that my own opinion is I would make it retroactive. That is not going to be very popular with the people who have already had a day in court and feel that the decision has been held in their particular direction.

But if the inequity is here today, and we think it is or I wouldn't be here and you wouldn't be holding these hearings, the inequity was there before.

Senator EXON. Thank you very much.

Senator DECONCINI. Mr. Chairman, let me thank you again in your absence. I sincerely want to express the thanks of this Senator, as did Senator Hatfield, for both the chairman's and Senator Exon's time, first of all, and for your commitment to this problem as well as other problems facing the military.

Without the leadership of Members of the Senate like yourself, this problem with the many problems and issues that we have before us in this body could go forgotten and a year or two could slip by and we would never get an opportunity to have these hearings and have your judgment as the subcommittee here possibly reporting some legislation. So I think a great deal of gratitude from myself and my constituents in Arizona goes to you and I want to say sincerely I appreciate the effort and the time you have put in.

Senator JEPSEN. Thank you, Senator, and thank you for your work in this area.

The Chair will now recognize the distinguished Congressman and Congresswoman, the Honorable Kent Hance, the U.S. Representative from the 19th District of Texas, and the Honorable Patricia Schroeder, the U.S. Representative of the First District in Colorado.

The chairman would beg the indulgence of the two folks from the other House and would you decide who should go first because I want to be totally fair about this.

STATEMENT OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Representative SCHROEDER. Mr. Chairman, I guess I will lead off, if that is all right with you.

Mr. Chairman, I just can't thank this committee enough for dealing with an issue that I admit I am immediately prejudiced on. So we may as well put it on the table. It has been something that concerned me a long time ago because I practiced family law a long time in Colorado before I came here.

We came because I think we represent, the two of us, a wide diversity of different views in the House and yet we are all in agreement on this. There are over 140 House sponsors on different amendments to the military pension system.

As I know, I am the cochair of the Congresswomen's Caucus and Ken Hance I guess is one of our prominent boll weevils and we have many Republicans that have worked with us on this. There are many Republicans in the Congresswomen's Caucus. It is bipartisan. So I think family issues are not partisan issues. Thank goodness.

We all know, unfortunately, the divorce rate has doubled in the last 10 years and that we had over a million divorces in 1975 and it is one of the real tragedies of the long-term marriages that have been affected. When you look at the statistics it is frightening because we now know that unmarried women constitute 72 percent of the elderly poor over 65 and that is divorced or single women. Seventy-two percent of the elderly poor over 65 are women.

We hear the myth of the married divorcee. It has been floating around forever. It is just part of our culture. Yet the Census Bureau tells us that last year only 4 percent of the divorces had alimony decrees and they don't go into how many of those alimony awards were ever collected. The difficulty and the cost of collecting them are phenomenal. States have different garnishment requirements and they have different problems and you can't do it until they are in arrears. You spend more money collecting it sometimes than they are worth.

I think that the telltale factor is that only 4 percent of divorces in America last year according to the U.S. Census had them.

Now, the *McCarty* decision has concerned me a lot because what it has done is that it has set military pensions totally apart by denying States the right to claim it as property. You will hear a lot of testimony today about whether or not if this is changed people will drop out of the military. My question is where will they drop out? If they go into the private sector their pensions will be considered by State law. There is really no where to go that I know of. This is really a unique situation that the Supreme Court under the *McCarty* decision

made. So I certainly don't think that can be used as a reason for people getting out of the military.

Furthermore, I think that if we think about it as Federal policy, which is what the Supreme Court asked us to do, they said that Congress should make this determination, I certainly think we don't want to make the congressional determination that if you are in the military you don't have to worry about your family. So that is a good reason for everybody to sign up. I think that would be the wrong thing that we would want to say.

So I have been interested in this for an awfully long time and we have been moving on it on three fronts and I thought the committee might be interested in what has happened on the three fronts.

If you look at the three major pension sections in the Federal Government, the military, the Foreign Service and the Civil Service, in 1978 we passed a reform in the Civil Service which said that if State courts declared that the Civil Service retirement should be split, then they would do it. They would show the court order to the Office of Personnel Management and it would automatically be done and then they would send out two checks instead of one which helps the enforcement and you don't spend all of your money trying to get it enforced.

I think that is probably very fair for Civil Service because in Civil Service you have more options as to which State you want to live in. The spouse is much more able to go out and work on her own and invest in her own pension if she wants to, or whatever.

We have also acted as a body on Foreign Service pensions and in those we have gone the other way. We have done something different. You will hear a lot of rhetoric about what the Hatfield bill on this side does or the Women's Equity Act, which is the other part that the Congresswomen are backing on the House side. You will hear a lot of rhetoric about what it does, but in essence what it does is exactly what we did in the Foreign Service pension.

What we said is that after 10 years of marriage in the Foreign Service if there is a divorce there is a pro rata manner that is all figured out by formula, and it is not that different from social security, that will be utilized unless the court says otherwise. So the court can take into account that someone didn't really contribute or that they have plenty of money on their own or they had a separate pension or what-have-you.

I think the reason that in the House we went two different ways on Foreign Service versus Civil Service is that in Foreign Service you don't have a lot of option where you serve. They tell you where you are going to go. There is much more opportunity for forum shopping and so forth.

So I tend to think that the military service is much more like the Foreign Service than it is Civil Service. You are moving around a lot, the spouse doesn't have the option of having their own career and never vesting a pension unless they have some unique pension plan that vests in 18 months or 2 years or what-have-you, which I don't know about, and so forth.

So the idea being the bill that I am on is similar to the one that Senator Hatfield is on which says that there should be a pro rata sharing but gives the court the right to undo it. It is strictly a presumption

that can be undone by the court, but the presumption is there. Now, Congressman Hance will be talking about his, and his is more in the DeConcini manner.

I guess what I am saying is that I think something needs to be done. It is up to you gentlemen in your wisdom to figure out which way to go, but right now I find it a total travesty that we have amended the law for the Civil Service retirement and for Foreign Service retirement and military spouses, who I think we make the most demands on, we have done nothing for.

The other reason that I tend to like my bill better is a lot of States have different laws dealing with the military and you could do foreign shopping. For example, in three States they allow for division of pensions, but not military pensions, and that is Alaska, Colorado, and Indiana. They will divide other pensions, but they will not divide a military pension.

So, since I have a lot of people in Colorado and I happen to represent that State, obviously I would like to go a little beyond State law. Maybe that is my problem.

There are also five separate-title States—Florida, Mississippi, New York, Virginia, and West Virginia—where there is some question whether the court would allow pensions to be considered. Because you don't have a lot of options of where you are living in the military, it is a little different than normally leaving it to State courts because you don't just say, Gee, general, it is nice that you wanted to send me to Colorado, but I really want to live in Omaha, or what have you. They will say, Thank you very much, and you go to Colorado. Therefore you would lose your right if there was a divorce filed there and you may really consider yourself a Nebraska resident.

Another concern about this is I asked the Government Accounting Office to see how many pensions have been divided under the new civil service reform for that retirement system. Now, I grant you it is not quite fair because it has only been in effect for a little over a year, but they looked at 159 court orders and found out two-thirds of them were from three States: California, Texas, and Washington. That is not a total sample. It may have just been happenstance, but it appears that the community-property States were sympathetic to dividing than some of the others may be, and when we get to the military it is unique.

Well, I could go on and on and on. I guess one of the things that bothers me the most is we always see things like this which I got from the Navy commissary. It says, "The Navy wife, the toughest job in the Navy, we want to keep the good families in."

Well, I think she would like something more in line of recognition than a bag for her groceries. Unfortunately we are seeing more of that.

I was very moved in Colorado. For the first time many of the active-duty wives came to see me and said after the *McCarty* decision we really want to get involved. A colonel's wife said, "I am having great difficulty figuring out how I can ask junior officers wives to do all the things that I am supposed to ask them to do, when I now know that they won't do anything for them if anything goes wrong." They really have gotten very interested in it and I think they are very concerned about how we go forward.

I remember even in the Foreign Service bill, if I can just muse a bit, about how often the heat comes and we don't see the light. After it passed, I got some flowers from a gentleman who had fought me tooth and nail down to the bitter end on that Foreign Service retirement bill, and I thought, oops, the florist sent them to the wrong person or he had a slip. I thought, how am I going to deal with this. He will be really incensed to know that he sent flowers to Pat Schroeder who he has been fighting on this issue for 6 months.

I ran into him 1 day and I said, "I have really got to tell you something. I don't know who the flowers were intended for, but I got them and I never knew how to relate to them." He said, "You were supposed to get them and I just didn't have the courage to tell you why, but I will now because enough time has passed that I can say if." He said, "I went home that night after we lost and I sat down in the living room and my wife said, 'what is the matter with you'" I said, "That Schroeder woman," and he went into what happened. She said, "Really! I feel so much better." He said it was the first time he had even seen it from her eyes and he felt like a real idiot. So he went out and sent flowers hoping that some day we would run into each other, which we did, and we could talk about it.

But he said he really had not thought about it from her perspective as a Foreign Service wife and what had been going on in her life.

We will also hear that social security is a retirement benefit of the military. We all know that it was not meant to be the sole retirement income. We also know that the divorced spouse get a derivative of that and so she can never draw it until the member actually draws it which means not until he is of retirement age. It is different in the military pension.

We will also hear a lot of people saying that the retirement pension is different because retirement is kind of like a retainer, they can pull you back in.

Well, again, as far as I know, no one has been involuntarily recalled from retirement since 1939. So that is longer than I have been born. Maybe some slipped in somewhere but I am not aware of any involuntary recall since 1939.

Furthermore, I still don't think the Congress would use that as a means to saying members in the military don't have family responsibilities like every other person in the United States, in every other State and in the private sector and even in our Federal employment. So I really don't see that as a valid argument either.

I thank you for your time and I am honored to be here with Ken Hance and I know he has a lot to say, too. So let me quit at that point.

Senator JEPSEN. What is your time element, Congresswoman?

Representative SCHROEDER. I am chairing a hearing.

Senator JEPSEN. Well, if we may, we will——

Senator EXON. If she is chairing a hearing, maybe she would like to go. I would like to say, I have no questions of Congresswoman Schroeder. I appreciate very much listening to her explanation of the differences as you see them between the military and civil service. And I cannot thank you enough for coming over to give us this testimony.

Thank you very much.

Representative SCHROEDER. I thank you very much, and I cannot tell you how appreciative we are of getting hearings on the Senate side on this issue. I think it is really critical.

Senator JEPSEN. I am inclined to agree with your approach. I think we have to look at the front end somewhere on this to arrive at some equity down the line or a combination thereof. But to try to chase things after the fact is not going to help anyone do any planning or anyone do anything they can count on.

With the 72 percent of the poor over age 65 being women, you would, I assume, then be interested and concerned about providing for them possibly ahead of time for equal retirement funds and so on, regardless of what women were doing, whether they were in the home, in the job or wherever. I assume that is correct?

Representative SCHROEDER. Certainly, I have no problem—I think we need to do much more for the homemaker all the way across the board. It is incredible that in their old age we say, well, it was nice of you to do all of that, it is what we told you to do, and now you get honor. It is almost as valuable as a grocery bag when it is empty.

Senator JEPSEN. And possibly even consider some economic motivations and so on, incentives to assist those in the family to provide for their elderly parents, mother or something; that is not without the realm of reason in your feeling?

Representative SCHROEDER. Not at all. I support the concept. When we talk about day care, it should not just be children. It should be anyone in the family, whether they are handicapped or elderly or what have you. I think that is very serious.

Senator JEPSEN. Or providing for tax incentives for companies where women who are forced to work outside the home might have their children closer to where they work. Do you have any problem with that?

Representative SCHROEDER. Not at all. If we do it for the automobile, you would think we would care as much about children, would you not?

Senator JEPSEN. In your testimony you stated you leave some discretion to the courts. What if there are powerful one-sided reasons for a divorce? How much latitude do you really leave for discretion, in that a good part of the formula, as I understand your statement here, is intact or will be applied?

Representative SCHROEDER. Well, basically, there are two pieces to a divorce: Whether or not you will grant the divorce, and in most States now they are no-fault, so it does not make any difference about fault. Most States will grant the divorce.

But when you get to the property, States look at the entire picture. Now, that is not to verify that every judge sitting on the bench is always perfect and always objective. We all know better. But I think most State courts have been terribly fair in looking at the total picture, who helped contribute to it and so forth as they draw the lines if the parties can't come to an agreement.

And in most cases the parties come to some kind of an agreement. But we give the courts that discretion. We say there is a presumption that it will be, and any presumption is rebuttable. So all it does, it just shifts the burden of proof, is what it does.

In the past we have said to the homemaker, it is your burden of proof. If you want anything, you must go in there and prove that

you were terrific, you were wonderful, you never did anything wrong, and so forth. We are now saying, look, we assume they were equal partners, that they were contributing to the family, that they both were doing something. The court will not sit here and weigh how many times she did the dishes and how many times he mowed the lawn.

So it is a presumption that that will happen. Now, if the other spouse can come forward and rebut that presumption with anything that the court considers justifiable evidence, that she is independently wealthy, or they may have been married 10 years but he never saw her, he could not recognize her even in court, whatever it is, I think you could rebut that. There are any number of different things they could come forward with.

Senator JEPSEN. In blanket community property laws, it would take all of the judgmental, arbitrary judgmental area out of it, would it not?

Representative SCHROEDER. That is why I leave in the rebuttal. I allow it to be rebutted if the other side brings evidence forward, and I think that is probably a fair thing between community property and noncommunity property States. It is saying, we consider this a part of the income they both earned, because they really were both in the service of the United States.

Show me a Navy or Air Force or Army wife who is not really serving the country almost as much as the husband. They are both in the service. They are both earning it. It is presumed it will be split unless you showed that they never showed up for a function or never did anything.

Senator JEPSEN. Thank you very kindly.

Representative SCHROEDER. Thank you.

Senator JEPSEN. Now, Congressman Hance, you may proceed. Thank you for your patience. We look forward to hearing your testimony.

STATEMENT OF HON. KENT HANCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Representative HANCE. Mr. Chairman, Senator Exon, I appreciate the opportunity to be here. I appreciate your leadership in holding these hearings and giving us an opportunity to testify.

There are a lot of people throughout the country that we have heard from, who just read in the paper or something that we had introduced this bill, who are very concerned. I would just like to summarize my testimony and make my testimony a part of the record if that would be all right.

One quote I would like to point out at the very first is: "We recognize the plight of the ex-spouse of a retired military service member is often a very serious one." Those words were written this summer by Supreme Court Justice Blackmun, and I think the Supreme Court and everyone who has looked at this problem realize that this is a severe problem.

It came to my attention before I was ever elected to Congress, much like Congresswoman Schroeder, in that I practiced family law. And to visit with a woman who is getting a divorce and that has been married to someone in the military for 20 or 30 years and has followed him from base to base to maintain the family, and to look at them and

see that they are completely lost as far as establishing a career, because it is extremely difficult for a woman to establish a career being married to someone in the military.

But I think the most difficult thing is trying to explain to them, after a divorce has been granted and the judge has given the part of the retirement benefits to the wife, trying to explain to her that she is never going to collect any of those benefits, simply because it is almost impossible to follow through on a court order without the assistance of the legislation that I am presenting. And that would be allowing the Secretary of the branch of service to have separate checks to compensate her for the time she was married to the individual and the retirement paid in during that period of time.

I think it is important to realize that this is a segment of our society which has not been spoken to in the past. It has been taken for granted and there has been a tremendous sacrifice.

A lot of people, and I have some letters generated, that say why do you want to allow my wife to get part of my retirement if she is at fault in the divorce? That is really not for us to decide. That is for the courts to decide. And as Congresswoman Schroeder pointed out, most of your jurisdictions have no-fault divorce.

But at the same time, if during the period of time they were married they were paying into retirement that equal share should be reimbursed. I think this is something, in talking to the individuals that have been affected by it, I guarantee you, you will just feel the hurt they have, not only going through a divorce, both sides, but realizing that all of a sudden they are out in the job market without any training, without any hope of receiving any of the retirement benefits.

And usually a military family has not collected any sums of money to have any estate to divide up, and that speaks both for the dedication of the wife and the husband in working for the military, in that we all know we do not pay them enough. We wish we could pay them more, but there is not enough money.

This is a severe problem. It is not an issue that is liberal or conservative. It is not an issue that speaks to any political party. It is an issue that in fairness I hope this committee can have a markup and draft some legislation.

And I think my bill is a good bill. But if you all come up with one you like better, you certainly will not offend me if you solve the problem, and I am for you. And anything I can do to assist you in your endeavors I will be more than happy to do.

I really appreciate your having this hearing. I think it speaks for you, Mr. Chairman, that you have taken the lead on this to have the hearing, not saying you are going to agree with everything we all say, not that you are going to write any bill that we all would agree with. But this is a little controversial and I appreciate you for having the hearing.

Senator JEPSEN. I appreciate your testimony. You seem like a very fair person and I appreciate that. It appears that the problem we are talking about here, the impact that the *McCarty* decision has had on former spouses of military-service members, are aggravated in Texas where there are no alimony awards. I have received a number of letters from folks from Texas.

Has the Texas Legislature in your knowledge considered revising their laws to provide more protection?

Representative HANCE. I do not see anyway the Texas Legislature would change the law with regard to alimony. The only thing we have is temporary alimony or temporary support while the divorce is pending, which can be as short as 60 days.

And I wish I could speak to that issue and say that there might be a change. But I do not perceive that that is going to change. The community property laws are, I think, very fair. They try to split the property that has been accumulated during the time the people have been married. They try to split it down the middle, and I think they are very fair in that regard.

But boy, I will guarantee you, if you could get part of that retirement, you can forget it. They come back in after the divorce and they say: OK, now the retirement is starting to come in, 3 or 4 years later. Now how do I get my share. And you stop and you look at your client and you hem and haw around and you finally say: Well, you do not, simply because they do not have enough money to chase someone from jurisdiction to jurisdiction to jurisdiction, and file all the proceedings you have to file.

I think the best advice you can give your client usually on a deal like that is that you are not going to get it, because otherwise, if you say, well, we will file something in South Dakota, then he moves to Ohio and you say, well, we will file in Ohio—and all of a sudden, legal fees. Even if you win, you have spent more on legal fees.

And I think that could be solved by allowing the Secretaries of the various branches to split the check once they are notified by the court. And I do not want the service to get into dictating what the court should do. I think the States should maintain that right.

Senator JEPSEN. Senator Exon.

Senator EXON. Thank you very much for coming over, Congressman. We appreciate your testimony.

Representative HANCE. Thank you.

[The prepared statement of Representative Hance follows:]

PREPARED STATEMENT OF CONGRESSMAN KENT HANCE

"We recognize the plight of the ex-spouse of a retired military service member is often a serious one."

Those words, written this summer by Supreme Court Justice Harry Blackmun, sum up precisely the situation for hundreds of thousands of women across our country divorced from military men. Their plight is serious and widespread. It needs to be examined and corrected as quickly and completely as possible.

Unlike her counterparts in civilian life, the military wife lives her life at an extreme disadvantage when it comes to developing herself outside her husband's world. Her husband's transience—often changing assignments and locations as frequently as once or twice a year—makes her a risk with potential employers, even if she has the necessary qualifications. The constant moving allows her little time to develop any sort of career, or even hold a job outside the home. Even with the best skills and qualifications, the social situation only recently has been such that she could enter the job market. So, in the vast majority of cases involving military wives over the past 10, 20, 30 years, the wife of a military man has had but one career—her husband's.

After 10, or 15 or 20 years of military life, many couples divorce—in recent years as many as 50 to 60 percent. As in civilian life, the couple splits its assets according to a court decree. A division of military retirement pay is often included in this court order. But, again, the military wife falls under an extreme inequality.

Shortly after the divorce is final, her husband moves, or is transferred—to another base, another state, perhaps even another country. Or he simply drops out of sight and quits paying her the court-awarded share of his pension or retirement money. Or, in many cases, he never pays her a cent to begin with.

Sometimes she is able to find him, and sometimes she can even get him to pay up. But most times that simply isn't the case. Generally, the military refuses to reveal the whereabouts of its retired members and the search to find the ex-husband and present him with a decree of contempt of court can result in substantial legal fees, which many of these women simply cannot afford.

For many women deserted like this, the options become extremely limited. Some have families to fall back on; others have some marketable job skills and are able to manage. Others may get menial jobs that pay minimum wage or slightly more. For many others, the option is reduced to welfare, or food stamps or supplemental security income, all of which come at a substantial cost to the taxpayers.

This is a classic case of a situation in which a legal right is rendered meaningless because of the absence of an effective means of enforcement.

A case concerning this very problem was addressed in the Supreme Court this summer. The McCarty vs. McCarty decision, in which the Supreme Court ruled 6–3 against allowing military retirement to be divided as community property was seen by many as the death knell to former military wives seeking some way to get their husbands to make good on their court decrees.

But that simply is not the case. Even in his opinion, Justice Blackmun—whom I quoted earlier as agreeing that "the plight" is "serious," wrote that the decision for more protection of former military wives "is for Congress alone."

As Justice Blackmun notes in his opinion, former spouses of civil service and foreign service personnel are taken care of under public law enacted in recent years. These laws passed with overwhelming support. Clearly, the precedent has been set and the intent of Congress firmly established.

I have introduced into Congress H.R. 1711, which I feel would go a long way toward righting this wrong. H.R. 1711 would authorize the Secretary of the appropriate branch of the military to comply with the terms of a court order in connection with the divorce of a former member of the uniformed services receiving retired or retainer pay.

By authorizing the military administration to divide the retirement pay according to the court order and make direct payments to each spouse, the husband is no longer responsible for seeing that his ex-wife receives her share of the court award. Nor can he prevent her from receiving her share. The payment of her portion of the retirement 'pay,' as decided in the divorce court, comes directly from the military.

The bill does not divide military pay. The state courts retain this authority. It does not propose untested or unusual solutions, nor does it address the issue of garnishment of delinquent payments. It merely offers the same protection and right to former military spouses that is available to civil service and privately insured spouses.

The cost of making an additional entry of each couple into the military pay system is negligible. The cost of supporting these divorced military women through welfare or food stamps or other government assistance programs is, and will remain, very high and very unnecessary, when a simple solution such as I have proposed is available.

I agree with Justice Blackmun. The plight of an ex-spouse of a retired military service member is often a serious one. But it can be corrected. H.R. 1711 is a good and responsible solution to this serious and widespread problem.

Senator EXON. Mr. Chairman, I would like to enter into the record—at this time; I have not had a chance to go through it, but I did receive a request from Lt. Col. Harry Solomon to have his communication to myself and others entered into the record, and I would like to enter that into the record at this time.

Senator JEPSEN. Without objection, it is so ordered that the testimony be entered in the record and considered as read.

[The information follows:]

BRUSSELS, BELGIUM, *August 9, 1981.*

Hon. J. JAMES EXON,
U.S. Senate,
Washington, D.C.

Subject: H.R. 3039, Military Spouse Retirement Equity Act; H.R. 3117, Economic Equity Act; S. 888, Economic Equity Act.

DEAR MR. EXON: During the past two years I have spent a considerable amount of time corresponding with various members of the Senate and House Armed Services Committees expressing my opposition to the subject legislation. In particular, I have written to Rep. Schroeder on four separate occasions and sent copies of that correspondence to the respective Committee members.

My purpose in writing to you is to once again express my opposition to the subject legislation; to explain why I am opposed to it; and to provide you with a written statement of opposition which I would ask you to have read into the record of any hearing that may be held.

First, to summarize briefly my position:

A. Twenty (20) years must be the minimum marriage requirement. The military member has no right in the retirement benefit until after completing 20 years of active duty. To legislate that a wife has rights in that benefit after only 10 years is to legislate a right in the member's pension which is superior to that of the retiree. This is unacceptable on equity grounds. Simple equity demands that they both must put in the same amount of time.

B. No portion of this legislation should be made retroactive, because of the disastrous financial consequences it would have on those of us who have made settlements (under existing State laws) with our former wives and then gone on to make other financial commitments. This legislation—if made retroactive—would provide my former wife with a windfall gain such that she would be entitled to virtually all of my pension. This is clearly unacceptable.

C. In addition, the provision for court ordered participation in the Survivors Benefit Plan (for divorces prior to the effective date of the legislation) is unacceptable. The Property Settlement Agreement that I have with my former wife calls for a fixed amount of alimony until such time as she remarries or I die. To legislate that she could obtain a court order which would require me to involuntarily participate (at great cost to myself) shows total disregard for my rights. That Property Settlement Agreement defines both of our rights in the divorce action and is designed to protect both parties. I have rights under that contract, which I negotiated in good faith, and I will not have those rights infringed.

D. The Federal Government has no right to legislate any laws which could adversely change or cause to change the contract I have with my former wife.

Second: I have received a copy of a press release by Rep. Patricia Schroeder which consists of a section-by-section analysis plus canned questions and answers regarding her proposed H.R. 3039. I am enclosing a statement of opposition which will analyze H.R. 3039 and rebut the arguments she provides. A key question asked at last year's hearing on this legislation was: "Why shouldn't the Congress mandate as Mrs. Schroeder asks?" I trust the enclosed statement will answer that question.

In closing, I want to reiterate my key points:

A. Twenty (20) years must be the minimum marriage requirement on simple equity grounds;

B. No portion of this legislation can be made retroactive;

C. Any legislation which enfringes existing rights, property settlement agreements, and court ordered final divorce decrees is unacceptable.

Very truly yours,

HARRY SOLOMON.

[Attachment.]

STATEMENT OF OPPOSITION BY HARRY SOLOMON, LT. COL. U.S.A.F. (RET.)

I have recently received a copy of a press release by Rep. Patricia Schroeder in which she provides a section-by-section analysis plus a series of canned questions and answers designed to justify her proposed H.R. 3039 (as well as other related legislation). I have been corresponding with Rep. Schroeder for almost 2 years regarding this legislation and find that her arguments are no better now than they were two years ago. As a matter of fact her section-by-section analysis is extremely shallow and the canned answers to the questions are nothing more

than naive assertions. I would like to say first of all that I am opposed to this legislation for the following reasons:

1. To legislate that a former spouse is entitled to a pro rata share of the retirement benefit after only 10 years of marriage is to legislate a right in the military member's pension which is superior to that of the retiree—who has no rights in that pension until after 20 years.

2. No portion of this legislation should be made retroactive, both in regard to the pension as well as to the survivors benefit plan. To do so would infringe rights under my existing property settlement agreement with my former wife. In addition, it would cause disastrous consequences for those retirees who have settled their accounts with their former wives and then gone on to make other financial commitments.

3. In general, I call this unwarranted meddling of the Federal Government in the private and personal financial planning of the individual citizens. This is a classic example of the welfare mentality at work—of big brother government—thinking that it knows what is best for each and every individual citizen.

4. The Federal Government has no right to legislate any laws which could change or cause to change the private contract that I have with my former wife.

At this point I would like to present my own section-by-section analysis of H.R. 3039 in order to point out the flaws which exist in Rep. Schroeder's arguments.

SECTION 1 SHORT TITLE

No comment.

SECTION 2 FORMER SPOUSE SHARE OF RETIRED OR RETAINER PAY PRO RATA SHARE

A fundamental flaw in this entire concept is that the military member has no rights in the retirement benefit until completing 20 years of active duty service. To legislate that a former spouse has vesting in that retirement benefit after only 10 years of marriage is to legislate a right in that pension which is superior to that of the retiree. Clearly, this is inequitable—and unacceptable. Rep. Schroeder gives considerable lip service to avoiding "ignoring the wife's contribution to the husband's career." The truth of the matter is that she has made it painfully clear (see the attached letter) that she really does not care if the wife contributes anything or not. The sole argument, as far as she is concerned, is "years of service." Rep. Schroeder makes the claim, in her letter, that a military member gets a pension "based on years served, not on quality of work." A person giving a little thought to that comment would accept it at face value. However, it is not true. In order to stay on the payroll and accumulate the necessary "years of service", certain minimum standards of performance must be met by the military member. The military member is subject to annual performance ratings which evaluate the "quality of work" and determines his/her suitability for remaining on the payroll. Unless minimum standards of performance are met and maintained, the military member can be removed from the active duty roles, and thus, forfeits any pension rights. Therefore, "quality of work" is an important consideration. However, Rep Schroeder feels that a spouse's share of pension benefits should be based upon "years of service" and the quality of the marriage is not important. At the beginning of her letter she states that she wants to recognize the wife's contribution to the husband's career—then concludes, by saying in effect, that she doesn't care if the housewife contributes anything or not. This is at least contradictory—and surely inequitable.

If the sole criterion is time, then simple equity demands that both parties put in an equal amount of time. Ten (10) years for the wife and twenty (20) for the husband is hardly equitable. There are only two ways to make this division of the military pension equitable—

(1) Twenty (20) years must be the minimum marriage requirement; or

(2) Change the law to grant the military member vesting in the retirement benefit after only 10 years of active duty service.

In addition, the risks and responsibilities assumed by the military member so far exceed any risk or responsibility assumed by the spouse as to totally preclude the division of that personal entitlement during a divorce action.

Saving clause

This is an attempt to protect any rights (opportunities) that a spouse or former spouse may have under existing State law or rule of law etc. It is significant to note there is no attempt to protect any rights that the member or

former member may have under existing State law or rule of law etc. This is hardly an equitable provision of this bill.

Specifically, I have rights under existing State law and I will not permit those rights to be infringed—either by granting protection to my former spouse under this proposed legislation, or by failing to grant me protection under this same legislation.

SECTION 3—FORMER SPOUSE SHARE OF SURVIVOR ANNUITY

Joint employee-spouse election

To mandate participation in the survivors benefit plan is to deny the military member of a fundamental right—and freedom—i.e. to provide for his family in the way that suits his needs, those of his family, and his financial situation. Feminists argue that the man may unilaterally opt out of the survivors benefit plan. This is correct and is as it should be. As long as there is cost involved and the military member is paying the premium—unilaterally—all authority for that decision must rest with the military member.

SECTION 4—SURVIVORS BENEFITS IN CASE OF DIVORCES BEFORE EFFECTIVE DATE

Election of survivors benefits for former spouse

This provision, which would open the door to court ordered participation in the survivors benefit plan, is totally unacceptable. I have a property settlement agreement with my former wife which defines her rights—as well as mine. To enact this provision would be to drive a wedge into that property settlement agreement and could cause me to involuntarily participate in the survivors benefit plan (at considerable cost to me) and shows total disregard for my rights by the Federal Government. I have a contract with my former wife and I have rights under that contract. I negotiated in good faith and will not have those rights infringed. The Federal Government has no right to change or cause to change my rights under that private contract. In addition, to grant approval authority to the second wife is nothing more than an attempt to—

(1) Protect the second wife; and if a second wife doesn't exist (hopefully)—then

(2) Force the military member to provide survivors benefits for some other women, i.e. the former wife.

Furthermore, the result of this particular provision will be to—

(1) Cause the second spouse to contribute to the survivors benefit plan while the former spouse gets a free ride—contributes nothing.

(2) It would provide a wonderful insurance policy for the former wife at no cost to her—but, at cost to the current wife.

(3) It would create rights for the former wife; give approval authority to the second wife; and deny the military member any say so in the matter—while at the same time requiring him to pay the bill.

SECTION 5 EFFECTIVE DATE

This is the only saving grace to an otherwise bad piece of legislation. To make any of this retroactive would result in incredible financial hardship for those of us who have reached an equitable settlement with our former wives and then gone on to make other financial commitments. As I stated above, under section 4, retroactivity of the survivors benefit plan for those of us who are already divorced is unacceptable. No part of this legislation should be allowed to become retroactive.

The following comments are based upon Rep. Schroeder's press release as well as various newspaper articles which reflect the views of feminist journalists and feminist special interest groups. Rep. Schroeder poses various "canned" questions and then provides the "canned" answers, which are naive, incorrect, vague generalities, and some which are contradictory. She apparently assumes that the reader will accept the superficial explanations she gives.

Question. Why should the Federal Government be involved with divorce settlements?

Answer. The most significant thing to notice about this response is that she does not answer the question. Her "response" to this question consists of—

1. Editorializing: ". . . the number of divorces has skyrocketed in the last decade. . . ."

2. Implying questionable cause and effect relationships: ". . . the introduction of no-fault divorce has caused older women to bear the economic burden of divorce."

3. The use of questionable statistics: If only 22% of 4.5 million women receive child support, how many of the 4.5 million have children? If 98% of the divorce cases grant custody to the wife, this clearly discriminates against the husband/father. Surely the Congress can address this inequity by amending the present proposed legislation to include a requirement for 50/50 custody in all divorce cases involving a military member, unless the member waives that right in writing. Equity involves much more than just dividing up the pension.

Rep. Schroeder continues with other sweeping generalities which do not answer the question as to why the Federal Government should be involved in divorce action. It boggles the mind to think that any one seriously believes that the Federal Government had a role to play. The truth of the matter is that the Federal Government should not be involved. It is big brother government at its worst. If you can justify Federal Government involvement in this, you can justify Federal Government involvement in anything. I am in complete agreement with the sentiment expressed by OMB Director David Stockman: "The idea that's been established over the last 10 years that almost every service that someone might need in life ought to be provided, financed by the Government as a matter of basic right, is wrong. We challenge that. We reject that notion." This proposed legislation is another example and must be rejected. Get the Federal Government out of the personal lives of the citizens.

I have a great deal of problem with those people who think that the solution to every problem is to pass another law. We may be a nation of laws, but we became great by letting the people do for themselves. We are in the process of strangling this country in legislation. This legislation will accomplish little more than creating more problems and employment opportunities for lawyers.

The fundamental flaw in the entire concept is the failure to balance rights versus responsibilities. Senator Durenberger, in the Congressional Record of 7 April 1981, states: "We talk of marriage as an equal partnership." And that is the extent of it. We talk of it—we give lip service to it, because it is pablum that goes down easily. It makes everyone feel good that the partners are equal. The fact is that it is not an equal partnership. The responsibilities of men and women are different, and therefore the authority and the rights are different. To suggest that the husband is responsible for the financial support of the family, but that the wife has equal authority is to legislate an impasse. Its a guaranteed formula for a marriage to fail. If the husband is responsible for the financial support of the family (the wife) then the wife must be accountable to the husband. I am sure that this thought offends many feminists, but if you doubt the parity of responsibility and authority, just pick up any elementary textbook on management principles. They are the same, whether you are trying to manage the government, a business, the church, or a family.

I am reminded of the extreme position taken by my former wife: "I can do anything I want. No matter what I do, you are responsible. You have no rights. You have no authority. The bills are your responsibility—that's what men are for." This legislation will confirm that childish position. Furthermore, in the case of the military, the military member is subject to so much more than any spouse could ever be. The responsibilities and the risks assumed by the military member far exceed any responsibility or risk assumed by the non-military spouse

The military is subject to risk—the spouse is not.
The military member is subject to hazard—the spouse is not.
The military member is subject to combat—the spouse is not.
The military member is subject to standards of performance—the spouse is not.
The military member is subject to the UCMJ—the spouse is not.
Retirees have employment restrictions—the spouse does not.
Retirees are subject to recall—the spouse is not.

An article in the Washington Star this past spring (1981) discussed foreign service wives and how difficult life was for them these days. It related how they—

No longer shopped in quaint bazaars;
Comforted the children awakened by gunfire;
Evacuated the family at 4 a.m.

My own experience in Teheran, in November and December, 1978, indicates otherwise—

Women still spend their time in quaint bazaars;

The husbands spend their time comforting the children and the wives regarding the gunfire;

The wives were the ones who were being evacuated at 4 a.m. by the husbands.

On 6 November, 1978, I was stranded at an Iranian air force base because my car and driver had been commandeered by a group of wives to go shopping in a "quaint bazaar." I made my way home by bus, taxi, and on foot, in a hostile environment, while Teheran went up in smoke and the wives were being escorted home.

Another article in the Washington Star quoted a woman as saying the following: "What galls former wives is that the second wife may share in the pension when she may have contributed nothing to the husband's career." I can assure you that what galls the military member is that a former wife may share in that pension when she contributed nothing to the husband's career.

I spent 9 months in Vietnam and feel that I earned every penny of that pension on one single mission over North Vietnam. I do not buy the sad tale of former wives when they speak of the long separation they endured. What do you think we were doing in Vietnam—lying on the beach?

I am absolutely opposed to any division of the military pension during divorce action. The demands of the military life are so unique and so hazardous as to totally preclude any such division of that personal entitlement.

In addition, to provide a pro rata share of the pension to a wife on the basis of 10 years of marriage is to legislate a right in that pension which is superior to that of the military member. If this legislation is proposed on the basis of equity, then equity demands that both parties must put in 20 years.

Some final "comments" on this question:

I believe this legislation will "trigger" divorce action.

This legislation would shift all risk from the spouse to the military member.

This legislation will result in the military member being deprived of control over his/her financial affairs.

This legislation will result in a military career being less desirable than it is now.

Finally, I repeat, that Rep. Schroeder has not answered the question she has posed. She simply makes a few statements—quotes a few statistics—and feels that she has proved her case—which she has not. I quote an interesting article from the August 24, 1981, issue of Fortune magazine: "The politics of regulation—on behalf of the environment, consumers, women, the handicapped, small business unions, and assorted special interests—has economic costs that have come to be well understood in recent years and that look high in relation to benefits. It is now accepted that the identification of a social problem is not synonymous with proof that a Government program is necessary. And neither is government involvement. And neither is it necessary to pass another law.

Question. Would this bill permit the Federal Government to usurp the responsibility of State courts?

Answer. Rep. Schroeder boldly asserts: "No. This legislation simply ties the pension to the divorce settlement." If this isn't usurping States rights, then I don't know what it is. She then goes on to say that this can be modified or rejected by the divorce court. I don't believe that for an instant. Once its tied in—its tied in—and the divorce courts will have no choice in the matter. This legislation will clearly infringe State's rights. It will also infringe the property settlement agreement that I have with my former wife. My divorce was obtained in a State where alimony requirements are statutory. That property settlement agreement defines her rights as well as mine. I do not want any Federal legislation to open up the possibility of further legislation on an issue that has long been closed, and subjecting the matter to modification by a divorce court. Under no circumstances should the Federal Government enact legislation which would require me to do anything retroactively—and at considerable cost.

Question. What happens if there is a second spouse?

Answer. This is a question that I asked Rep. Schroeder last year. Now I find that she has modified her bill somewhat to accommodate that question. Again, the demands of the former spouse special interest group are unacceptable. I know

of no valid reason why my present wife (or anyone else's present wife) should be relegated to the position of being "entitled to the residual amount" of survivors benefits. This demand takes gall. This is not a special interest group. It is a special interest group within a special interest group.

Question. Why does the bill require the retiree to take survivors benefits unless the spouse or former spouse, if any, agrees in writing to waive the survivors benefits?

Answer. Legislating that the spouse is entitled unless she waives in writing is granting total control to the woman. A wife has no right to demand that any particular survivor benefit plan be provided for her. Nor does the Federal Government have the right to impose a particular plan upon the husband. As long as the husband is responsible for the financial support of the family, he has the right and authority to decide how to best fulfill that obligation. Under current policy a retiree can unilaterally opt out of the survivors benefit plan—and that is as it should be. As long as the SBP is funded entirely by the retiree, the final decisionmaking authority must rest with the retiree. I declined the SBP in 1975 because it was too expensive. Contrary to Rep. Schroeder's claim that the retired pay reduction is low—she only quotes average figures—my contribution to the plan would be 160/month. While it is fine for the Government (or any employer) to make that option available, it would be nothing short of dictatorial to mandate participation in that option. The choice must be left to the retiree. This legislation would grant rights to the former spouse—grant approval disapproval authority to the second wife—and allow the retiree no say in the matter—and he is paying the bill.

It appears that, under section 4, my former wife could go into court and demand that I participate in the survivors benefit plan since my divorce occurred prior to the effective date of this legislation. I have already declined to participate in the SBP (1975) and my former wife's rights are clearly defined in our property settlement agreement (1969). To legislate that I "shall receive retired pay at a reduced rate and provide a survivor annuity . . . if a court so orders," infringes my rights under that 1969 property settlement agreement. This provision is totally unacceptable.

Question. Is this legislation retroactive?

Answer. Rep. Schroeder replies: "No, it only applies to divorces that occur after the effective date of the bill." She then mentions two exceptions. First, she points out that a retiree may assign survivors benefits to a former spouse with the concurrence of a current spouse. Second, she points out that if there is no beneficiary, a former spouse would be entitled to the survivor benefit. What she fails to point out, is the third exception—that participation in the SBP can be required under a court order for those divorces that occur before the effective date of this bill. I do not think that was an inadvertant omission.

Question. Would this legislation be an additional burden on the agency?

Answer. Clearly it will. Rep. Schroeder claims that the "Social Security Administration has experienced no major problems in administering the divorced wife or surviving wife provisions of the Social Security Act." Obviously, it has not brought the Social Security Administration to its knees. What does she mean by a "major problem?" For a Government agency the solution to these kinds of problems is to add people, office space, more computers, and by increasing next year's budget—which brings us to Rep. Schroeder's next question.

Question. What does it cost the Government to provide these benefits to former spouses?

Answer. The answer that Rep. Schroeder gives to this question is a mixture of naivetè coupled with an incredible grasp of the obvious. Did she really contact the Congressional Budget Office to determine that there are no additional costs associated with these bills? Does she really believe her own answer? Does she believe for an instant that the CBO can find an identifiable line item in the Federal budget which spells out these costs? How does she think the administration of this bill will be paid for? By volunteer workers? Who will pay for the offices space, salaries, telephones, computer time, etc. This program will cost "millions" to administer—and no one will ever be able to identify the costs, because they will be "buried" and spread out over total agency budgets. If this is the extent of congressional cost analysis, it's no wonder the Federal Government runs a deficit every year. To state that there is no cost, because all this bill does is divide the annuity is ridiculous. To say there is no cost is naive—and to say that this bill divides the annuity is obvious. But—there is no relationship between the two statements. She is implying a cause and effect relationship which does not exist.

Question. Why does this legislation only apply to Federal employees?

Answer. Rep. Schroeder states that this "legislation is an attempt to bring equity to the Federal retirement system." An apple will never be an orange. This is nothing more than an attempt to force fit the unique military retirement system into the same mold as the Foreign Service, Civil Service, and private pension systems. "Bringing equity" will accomplish nothing but create inequities. The result will be an attempt to correct alleged inequities by creating real inequities—by trampling all over one party's rights by creating new rights for another party. This legislation is like trying to force a square peg into a round hole—with a sledge hammer.

Question. Should the military retired pay and survivors benefits be treated the same as other pensions?

Answer. Rep. Schroeder states, "yes". In fact the answer to this question is "no". The only way they can all be treated the same is for all the pension systems to be identical in all respects. Specifically, private pension plans are contributory and vesting occurs at 10 years. If a man and woman are married 10 years and contribute during those 10 years, they should share in the benefits accrued during those 10 years. There are two conditions which must be met: 1. a contribution, and 2. a minimum time of 10 years. The military retirement system is non-contributory and the member has no vesting in that retirement until completing 20 years. He must serve a minimum time of 20 years. I say again—to legislate that a spouse is entitled to vesting in the military retirement system after only 10 years of marriage is to legislate a right in that pension which is superior to that of the retiree. This is totally unacceptable on simple equity grounds. And, as I recall, Rep. Schroeder is trying to bring equity to the Federal retirement system (or is she?). If a spouse has rights in that pension after 10 years and the military member leaves the service after, say, 15 years, the former spouse could claim her share of a pension that does not even exist (and I understand that this has been tried by a former spouse). This whole idea flies in the face of "equity"—or "equal rights"—of "individual rights"—or "rights".

Rep. Schroeder talks about restrictions in employment after retirement. She claims that these restrictions apply to other Federal employees as well. She is mixing apples and oranges again. While these restrictions may apply to other Federal retirees, they do not apply to former spouses, unless the former spouse happens to be a Federal retiree in his/her own right.

Rep. Schroeder's argument that we contribute indirectly by accepting reduced pay for a more liberal retirement benefit misses the point entirely—and deliberataely, I believe. While the retirement plan is generous, it is designed primarily to force people out of the service, because the military cannot use a large number of senior ranking enlisted men and officers. It is designed to force people out by making it attractive (easy) to get out. The purpose of this management tool is to get rid of people. While the military manpower system recognizes the need to remove people from the active duty roles—and thus makes it easy for them to opt out voluntarily—the effect of this proposed legislation will have exactly the same effect on marriage. Many spouses will simply "opt out". It will make it easy for women to take their pro rata share and move on to something else—or to someone else. There is no doubt in my mind that this legislation will "trigger" divorce action.

Rep. Schroeder argues that "since the military retirement system is funded entirely by the Federal Government, it is reasonable that the government should have a voice in how the retirement benefits are allocated".

First—What a colossal presumption on the part of Rep. Schroeder and the former spouse special interest group she represents.

Second—If the military member is accepting reduce pay for a more liberal retirement, then I say this: The Federal military retirement system is not being funded entirely by the Government.

Third—The employment contract is between the employer and the employee (i.e. between the Federal Government and the military member). The relationship—the linkage—is at that point. It is between those two entities. There is no relationship between the Federal Government and the spouse, except through the military member. Furthermore, what the employee does with his pay (or his pension) is not the affair of the Federal Government. If the employee chooses to remain single—to marry—to have no children—to have 10 children—that is his affair and of no concern to the Federal Government. The flow of benefits is from the employer to the employee and subsequent to that it is from the employee

to his family (or survivors). The Federal Government has no business "allocating" any portion of those benefits to any one else.

Fourth—Rep. Schroeder complains that a retiree can unilaterally opt out of survivors benefits. It is strange indeed that Rep. Schroeder can attempt to justify the Federal Government's right(?) To allocate the pension as it sees fit (because the Government funds it entirely)—but she feels that it is wrong for the retiree to allocate survivors benefits as he sees fit—even though he/she funds it entirely.

It looks as though any argument is acceptable to Rep. Schroeder as long as she can keep the benefits flowing toward her special interest group. Apparently equity in the system is fine—as long as it is for women.

Let me repeat that the flow of benefits is from the employer to the employee and then to the family (or survivors) of the employee. For the Federal Government to mandate that the military member or retiree must participate in any particular benefit plan is authoritarian in the extreme. It violates all sorts of "rights"—"freedoms"—and individual prerogatives. Mandatory participation in the survivors benefit plan is only acceptable if it is free or there is an offsetting increase in retired pay.

If women want to fulfill the traditional "homemaker role", then it follows that men should be allowed to fulfill the traditional "provider role." To legislate the husband's role—and contribution—without legislating the wife's role—and contribution—is hardly equitable. I am sure that this will offend many women, but it appears that what they want is the "traditional homemaker benefits" without having to fulfill the "traditional homemaker role." It doesn't take much effort to imagine a situation where a woman spends 10 years married to a military member, during which period of time she pursues a career of her own and does not fulfill the traditional homemaker role. After 10 years of marriage she divorces, take her pro rata share, and goes her own way. The military member is afforded no such protection—or guarantees. The argument put forth by feminist groups is that the traditional homemaker has contributed to the husband's career. If you accept that argument, then equity—or fairness—demands that you accept the following argument: The husband has contributed to the traditional homemaker's career and, in fact, has clearly made it possible. We must avoid disregarding that contribution. Therefore, the Federal Government, if it insists on being involved in divorce action, must legislate fairly. It must provide an innovative idea for providing the military member with some sort of compensation for his contribution to the wife's career. This compensation must equal in value the pro rata share of the military pension that is received by the former spouse. For the Congress to legislate less than this is inequitable—and any pro rata sharing of the pension is unacceptable.

Finally, Rep. Schroeder's argument that the recall rate is close to zero is immaterial. The fact that it is a possibility is sufficient. In addition, other Federal retirees are not subject to recall—and neither are former spouses.

Question. Since the military is covered by social security, why do their divorced spouses need a part of the military retirement benefit?

Answer. If a military member can work well beyond 65, as Rep. Schroeder states, then so can a former spouse—particularly since the average woman is supposed to live 10 years longer than the average man. As a matter of fact, requiring women to work 10 years longer would be extremely equitable and would take considerable pressure off the social security system.

Question. What is the cost of not providing retirement benefits to divorced wives?

Answer. Rep. Schroeder states that unless you enact this legislation, divorced spouses will be on food stamps, welfare, and medicaid. The only way she can believe her own statement is to believe that all former spouses are destitute and incompetent. And we know that is not true. The proper solution to the problem is for the former spouse to go out and work—and earn those benefits in her own right. All it takes is a little initiative.

Finally, Rep. Schroeder states that if you do not do this, then you policy makers are telling our young women that they must work outside the home to insure that they will not end up on the poverty rolls in old age. She claims that they will not have a choice of whether to work outside the home or provide the traditional homemaker role. Rep. Schroeder is not correct at all in this statement. Women do have a choice and, in either case, all they have to do is work hard and they will ultimately enjoy those benefits.

In any case, not giving young women a choice should not present a problem to our policy makers. After all, our policy makers have already decided that our young men do not have a choice.

They have just recently ruled that young men must register for the draft, but young women are exempt. The men are not given a choice, but women are.

Rep. Schroeder, by means of her own press release, has led us very nicely right back to the fundamental flaw in this whole issue—the balancing of rights versus responsibilities. As soon as women accept identically equal responsibilities, they will be entitled to identically equal rights—and benefits. And no one will be able to deny them. To suggest that the military member must be subject to the risks—the hazards—the combat—and that the former spouse, who is subject to none of that—should be entitled to a pro rata share of the benefits is not equity. It is inequity.

Other points to consider:

(1) Rep. Schroeder has posed a philosophical question which she not only did not answer, but raises a very serious concern that there are individuals within the Federal Government who feel that the Federal Government should involve itself in individual personal and private decisionmaking. This is not a good sign for the future of individual rights in the U.S.A. This is another reason why the Congress should not mandate as Mrs. Schroeder asks.

(2) There is no doubt that this legislation will cause personnel and retention problems for the military. Another reason why the Congress should not mandate as Mrs. Schroeder asks.

(3) This legislation will certainly undermine the institution of marriage and the family unit. Liberals and feminists argue that because there are more divorces, we need this legislation. I say that the converse is true—this legislation will cause more divorces. Another reason why the Congress should not mandate as Mrs. Schroeder asks.

In conclusion, I would like to summarize my key points:

(1) I am totally opposed to any division of the military retirement pension during any divorce action for all of the reasons stated above.

(2) At the minimum, simple equity demands that 20 years be the minimum marriage requirement.

(3) No portion of this legislation should be allowed to become retroactive—either automatically or through court order. Properly, effectivity of this legislation, if enacted, should only apply to those persons who enter into active military career status after the date of enactment.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., September 9, 1980.

HARRY SOLOMON,
Pittsburgh, Pa.

DEAR MR. SOLOMON: Thank you for your letter on H.R. 2817, formerly H.R. 11354, the Divorced Spouse bill.

The intention of this bill is to avoid disregarding a housewife's contribution to her husband's career. A woman puts in years as a homemaker under the assumption that—because she receives no direct monetary compensation for her services—his salary is really for both of them. But, if they get divorced, she gets none of the pension earned during the years they worked side-by-side.

I realize that this is not the case in every marriage. However, individual circumstances are not taken into account when a retiree gets his pension. A pension is based on years served, not on quality of work. The retiree gets his pension whether he was an excellent worker or almost got fired three times. In the same regard, I believe the spouse's share should be based on the years of service, not the quality of the marriage or the reason for the divorce.

The idea is neither new nor unusual. I have introduced two other bills to amend the pension systems of the Foreign Service and Civil Service. Social Security already recognizes the contribution of both partners by giving former spouses a share of the retiree's benefits.

Sincerely,

PATRICIA SCHROEDER, *Congresswoman.*

Senator JEPSEN. I have a request from Congressman Whitehurst from the Second District of Virginia, who has submitted a letter and asked that it be read: I will read this letter word for word and I will submit it then for the record afterwards. I am doing this at his request.

DEAR ROGER: I understand your Subcommittee on Manpower and Compensation has scheduled hearings on legislation that would make it easier for former military spouses to obtain court-ordered payments for child support, alimony and property agreements and legislation that would establish entitlement to a portion of a military retirement for long-term military spouses.

I applaud your Subcommittee for taking the initiative to address this problem. Official recognition of the contributions of the long-term military spouse is long overdue. As more and more evidence points to the major role played by the military spouse in determining whether or not an individual decides to pursue a military career, I feel that legislation such as you are considering will be helpful as it will establish some personal security for the spouse. The long-term military spouse often sacrifices her own career in order to support her husband's military career. All too often it is not possible for her to complete her own education because of the high cost of out of state tuitions or frequent moves, which are a fact of life for military families. I need not dwell on all the other obvious sacrifices and contributions made by our career military wives, as they will be highlighted by the witnesses testifying before the hearing. But I do want to express my support for any legislative initiatives that would begin to officially recognize their contributions by treating them more fairly when a long-term marriage ends in divorce, which often is the direct result of the strains of a military career.

Certificates of appreciation, grocery bag logos and laurels on a husband's efficiency report are no longer satisfactory compensation. Military spouses should have the security of knowing that they can at least count on the services to help them obtain benefits awarded them by state courts. I hope your Subcommittee will plan to address other important aspects of this problem in the future, such as SBP and medical benefits, especially in cases where catastrophic illness previously treated at military facilities or under CHAMPUS renders the spouse uninsurable or places her in a position of not being able to afford a high-cost health insurance policy.

I will follow the Subcommittee's actions on this issue, and I will do everything I can to see that the House Subcommittee on Military Personnel and Compensation begins consideration on this very important subject. I would appreciate it if you would share my comments with the other Members of your Subcommittee.

WILLIAM WHITEHURST.
William Whitehurst.

Senator JEPSEN. The Chair will recognize General Tice, Deputy Assistant Secretary of Defense for Military Personnel Policy. Welcome to this hearing, General. We look forward to your testimony. And you may proceed.

STATEMENT OF R. DEAN TICE, LIEUTENANT GENERAL, U.S. ARMY, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR MILITARY PERSONNEL AND FORCE MANAGEMENT, ACCOMPANIED BY ROBERT L. GILLIAT, ASSISTANT GENERAL COUNSEL, MANPOWER AND HEALTH AFFAIRS, DOD; DR. SHARON LORD, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR EQUAL OPPORTUNITY; AND WILLIAM R. AMIS, ASSISTANT DIRECTOR OF COMPENSATION

General TICE. Thank you, Mr. Chairman. I am accompanied today by Mr. Robert L. Gilliat, the Assistant General Counsel for Manpower and Health Affairs of the Department of Defense; Dr. Sharon Lord, the Deputy Assistant Secretary of Defense for Equal Opportunity and Safety; and Mr. William R. Amis, Assistant Director of Compensation on my staff.

It is a pleasure to have the opportunity to continue working with the committee on matters of mutual interest and concern. Before I

elaborate on the subject of the testimony today, I would like to make an observation. The matter under consideration involves the termination of a marriage and the conditions under which that union is dissolved. The issue is very personal and one that lends itself to emotional involvement.

Personal attitudes and beliefs are bound to play a role in an individual's perception of how the matter should be addressed. Without doubt, each viewpoint, either pro or con, has compelling arguments that support differing conclusions.

Many view the conditions that apply to the military family as unique. In a way they are. We recognize that the family unit contributes to the military way of life and the effectiveness of the fighting force. Many may face hardships that undoubtedly place stress on the family and each member of that family.

We recognize this and our policies reflect our concern for preserving the cohesive nature of the military family. Continued emphasis has been placed on improving the quality of life for members and their dependents. This extends from the Office of the Secretary down through the units.

Efforts to support the military family have been in place since the early days of the Republic. Today, however, they are especially important as societal attitudes change. We see those changes reflected in the men and women entering the service and acquiring families.

In response to the needs of our members and their dependents, we have continued to stress the contributions that accrue to our defense capability through support of the military family. Consequently, we believe that the matter addressed today must be considered as objectively as possible, since any legislative action has the potential of affecting retired members and survivors of members, plus the men and women currently serving on active duty, who may be involved in divorce actions. Further, it may become a precedent for Federal intervention into what has been to date the exclusive jurisdictional authority of the individual States with respect to domestic matters.

The divorce courts often consider military retired pay as an item of income in the financial settlements of a divorce action. Members, like other civilians, are bound by the decisions of the State court. In order to complement this State process, Congress has waived the sovereign immunity of the United States from suit to allow the garnishment of military retired pay to satisfy child support or alimony obligations resulting from a divorce.

Military members, both active duty and retired are subject to the decisions of the State divorce courts and are legally bound to comply with the decrees of those courts. Failure to do so places members in violation of State law and subject to contempt proceedings. It has long been the Department's position that members are obligated by the terms of a divorce decree and are legally required to meet the financial settlements sanctioned by State domestic relations courts.

Traditionally, domestic relations have been regarded as a field of law that is exclusively within the jurisdiction of the individual States. Thus, the Supreme Court has held that—

> Insofar as marriage is within temporal control, the States lay on the guiding hand. The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not the laws of the United States.

Against this background of State versus Federal jurisdiction, we believe there are several objectives that should be controlling. First, we believe that the Federal Government should not be directly implicated in the decisions of State courts in domestic relations matters.

Second, we believe that any occupational status should not be a controlling factor in determining the rights of individuals in a divorce action and that a party before a State court should not be prejudiced by reason of military or spouse status.

In its decision in *McCarty* v. *McCarty* the Supreme Court addressed military retired pay and community property. The Court held that under Federal law military retired pay is a personal entitlement of the retiree and hence not subject to division under State community property laws.

In explaining the rationale of its decision, the Court pointed out that the application of community property principles to military retired pay would threaten grave harm to "clear and substantial" Federal interests in that division of retired pay thereunder would frustrate the congressional objective of insuring ultimate financial security for the individual who commits himself or herself to a career of military service and would interfere with the congressional goals of providing an inducement for enlistments and reenlistments as well as encouraging early retirement to achieve a youthful military force.

Although the Court held that military retired pay may not be divided under a State's community property law, it did not interfere with a State court's right to consider retired pay as income. Thus, State courts may take retired pay into account in determining appropriate levels of alimony and/or child support. Undoubtedly, the courts must also consider the hardships of the spouse that may have resulted from military service.

It is not uncommon for the States to consider the spouse's interrupted professional or income potential. Additionally, the termination of military benefits is often a factor in developing financial settlements. Depending on the circumstances of each situation, the court may be asked to consider that military service has placed the spouse in a less competitive economic position.

In their determinations, the courts may find it necessary to take military service hardships into account and pass their judgments accordingly. Military members are subject to such determinations to the same extent that civilian defendants are.

Several States do not provide for the award of alimony. In these exceptional circumstances it may be appropriate for State authorities to consider changes in their domestic relations laws.

Mr. Chairman, I would like to call to your attention a fact that is often overlooked. Unlike the other major Federal personnel systems, active military service is considered covered employment for social security purposes. By virtue of that participation, there is an entitlement to social security benefits that accrues to a divorced wife, although, as we have heard this morning, this does not accrue until age 60.

There are three categories of divorced wives and husbands that are entitled to social security benefits. Section 402(b) of title 42, United States Code, sets out the criteria for a divorced wife. Section 402(e) addresses the benefits for a surviving divorced wife, while section 402

(g) provides benefits for a surviving divorced mother. In each of these entitlements, the benefits available to a divorced wife are not subject to the maximum family benefit that would normally prevail.

With respect to legislative initiatives that address military retired pay in divorce proceedings, several bills offered in the last Congress and in this Congress generally fall into two categories; namely, those establishing an unqualified right of entitlement and those waiving the sovereign immunity of the United States for divorce decree compliance purposes. The first category would vest a right of entitlement in a former spouse to a portion of retired pay regardless of the circumstances of the dissolution of the marriage and regardless of the merits of each individual case.

We have interpreted these bills as an attempt to assure an income level for divorced spouses. However, for this divorced spouse of a military member, there is an entitlement to Federal benefits from the social security system. That benefit does not exist for Federal Government employees because civil service employment is not under the social security system as in the case of military service.

The second category of legislative proposals would waive the sovereign immunity of the United States to permit the disbursement of retired pay in compliance with a divorce decree. Several of the bills in this category are similar to Public Law 95–366, enacted in 1978, that is applicable to the civil service retirement system.

Under the provisions of these bills the Secretary concerned would be authorized to comply with the terms of a court decree terminating the marriage of a military member. Either total or partial retired or retainer pay would be paid to the former spouse as provided by the court decree. These bills would apply to the retired or retainer pay of members of the Armed Forces. It would not apply to the retired pay of members of the Public Health Service and the National Oceanic and Atmospheric Administration. The bills in this category do not establish an entitlement for the former spouse of a military member to a portion of the member's retired or retainer pay.

Although the principle embodied in these bills may have merit, we believe they are deficient in several significant respects. They also raise concerns from an enforcement standpoint which would be our ultimate responsibility. While we are sympathetic with the intent of these proposals, we have some reservations with the language, the problems they would create, and the legal questions that could arise. Consequently, we would prefer to address each legislative proposal on its merits and to provide Congress with a fully coordinated administration position on them.

Mr. Chairman, that concludes my statement. We will be pleased to answer any questions the committee may have.

Senator JEPSEN. Thank you, General. First of all I would like to just review the final part of your statement. You have had these proposals for some time, some longer than others. You have not, as of today, submitted any, as you say, fully coordinated administration position.

When might we expect that?

General TICE. I would think within the next month or so we would probably process our comments on those bills.

Senator JEPSEN. Within the realm of reason, I would hope that we could have that presented to the committee within the next month or as close to that date as possible. We do intend to move on with our work on this problem.

General TICE. Do you see any problem with that?

Mr. AMIS. Other than the fact that some of the bills involve all the uniformed services, which require cooperation with several other departments, their consideration of the bills is necessary for a unified position. But we will work with them to see if we cannot speed it along.

General TICE. I will seek to expedite those for you, Mr. Chairman.

Senator JEPSEN. I would appreciate that.

Now, you state that: "The principle embodied in these bills may have merit. We believe they are deficient in several significant respects" Are you prepared at this time to comment on that statement?

General TICE. We can comment on a couple of specifics. I think philosophically and in those instances wherein you would look to the Department of Defense to administratively execute the results of the decree; that is, findings of a State court, we are fairly openminded on that.

On the other hand, those involving entitlements, we still have some grave concern as to what the ultimate outcome would be if those bills became law. At this time I think that we are inclined to think that there is an administrative process where we would be willing to accommodate.

Senator JEPSEN. Let me see if I am tracking here. Do you feel the military or the administration at some point in time would have objection to specifically separating the check to reflect the grant the court had made in the settlement of a case so that the check would be divided?

General TICE. I think there are some of us who would be inclined to support that administrative process without difficulty. What the costs associated with that are we are not sure at this time.

Senator JEPSEN. Quote, "There are some of us." What about the rest of us?

General TICE. We do not have official positions yet. But I would be less than candid if I did not say that was an option available to us which might make sense.

Senator JEPSEN. How would you characterize military retirement pay, General? Does it represent deferred compensation for services performed during a military career or is it current compenastion for reduced but currently rendered services?

General TICE. I do not think, sir, we have a good definition. It depends upon the argument as to how you address the retired pay. There has always been the belief that the military pay was below the civilian sector on a comparable basis and you were compensated by being able to retire fairly young with a substantial stipend in retirement. If you accept that view, you would look at it as deferred income.

On the other hand, I am more inclined to believe that it is an entitlement and benefit associated with serving your country in the uniformed services or the Armed Forces.

Senator JEPSEN. To the best of your knowledge, have any retirees ever been involuntarily recalled to active duty?

General TICE. In World War II, sir, we did. And as you know, in our mobilization planning we very definitely plan to recall retired personnel. But I think that argument is not very persuasive to me.

Senator JEPSEN. Would you please elaborate? First of all, general, does the Department of Defense now encourage service members to retire after 20 years, or as a general rule do they prefer longer periods of service?

General TICE. We do not specifically encourage anyone to retire at 20 years. I think that we seek out of each and every member who serves in the Armed Forces a productive career. As you know, our great difficulty is, when you limit it to 30 years, at that time you are in your late forties or early fifties with great financial challenges, with children in college. Whereas if you retire at 20 years you can—you are young enough to seek a second career.

And I think those are conflicting goals that we have. But each individual who serves makes his own personal preference. The 20-year retirement is at the discretion of the service secretary, and we do not always honor those requests for retirement at 20 years in critical specialties.

Senator JEPSEN. Would you elaborate on why the Court supported its position in the *McCarty* case in that a division of the retirement pay would cause early retirement and—

The reduction of retirement pay by community property awards not only discourages retirement by reducing the retired pay available to the service member, but gives him a positive incentive to keep working, since current income after divorce is not divisible as community property.

General TICE. Bill, would you comment on that?

Mr. AMIS. As you know, that military retirement system has been designed specifically to complement the management of the Active Force. One of the things we aim to do is to make sure that the defense force remains relatively youthful and vigorous so that we can meet our defense capabilities, our defense requirements.

Toward that end we have instituted a 20-year retirement system. It has served us well for a good number of years now. In its consideration, the Court's consideration, they understand that the award of retired pay at the 20-year point has complemented that national defense purpose. I believe that is what they were getting to when they were making that statement.

Senator JEPSEN. General, I really appreciate your appearing here today and I have appreciated everything you have said and the spirit that you obviously are giving it. And I would ask you, if you would, to please comment as a career soldier about the role of the spouse in the serviceman's military career.

Much has been written about it. Much has been said about it. We have heard a lot about it. As a career soldier, would you tell us a little bit about that contribution?

General TICE. Sir, there is no doubt that the military family, which includes, of course, the husband, the wife, and the children, very much play a major role in our ability to accomplish our mission. For me personally to be involved in such hearings today is difficult. There is one side of the argument that is very emotional and philosophical, and I have no difficulty with that whatsoever. On the other hand,

there are very finite legal kinds of challenges which the Department must take under consideration.

But as an old soldier who has been married for 35 years, there is no way that I could be where I am today without my wife's and my family's support. I think we should all recognize that, Mr. Chairman. It is tragic when military families end up in divorce, and I certainly have a lot of personal empathy toward trying to seek a fair and equitable solution to the financial difficulties experienced by some of these families.

But there is no doubt in my mind that the military family comprises a unique relationship that is necessary for us to serve our country in the way we do.

Senator JEPSEN. As you have said, it is a unique relationship. And as we have heard here this morning several times, frequent moves make it difficult for the spouse to find permanent employment. Low pay and frequent change of station orders prevent the accumulation of assets in many instances, such as homes; and many other things are have heard by way of disadvantages.

In light of all of that and in following through what you have just said, do you think that Congress should afford more protection to the ex-spouses?

General TICE. I think that Congress ought to insure itself that due process is authorized to each member of the military, and that goes for the spouses, the husbands and wives combined. And I guess the difficult thing you are grappling with, Mr. Chairman, and I am myself, is the jurisdiction of the States in relation to divorce proceedings.

Senator JEPSEN. Does the Department of Defense, General, agree that State courts should have the discretion whether to apportion military retirement pay to spouses on dissolution?

General TICE. We support the view that States ought to have jurisdiction in divorce proceedings. The *McCarty* v. *McCarty* decision causes some problems in community property States. But we would hope that even though they do not divide the retirement pay as property, they consider it as income in the settlement.

Do you want to add anything to this, Mr. Gilliat?

Mr. GILLIAT. [Nods negatively.]

Senator JEPSEN. General Tice or whoever you may designate, how does the application of State community property laws to a service member's retirement pay interfere with the personnel management needs of the active military service?

Mr. AMIS. As to the management needs of the active service, retired pay is a very large incentive to attract and retain members in the uniformed services. I do not think we have any hard statistics to back up what I am going to say. It is mainly opinion. If you have the loss of an entitlement that is considered very important, you are bound to have a change in perception among members as to the value and worth of continued association. That is a negative viewpoint.

In those instances where you have a harmonious domestic relation, it does not become a factor. I should not think it would be a factor. So one side might wash out the other side. It is basically an opinionary view, since we have nothing to confirm or deny the issue. But that is how I am viewing the situation.

Senator JEPSEN. In view of the fact that prior to the *McCarty* decision all community property States considered retirement pay as a property right and therefore divisible upon divorce, what statistics do you have to show that State laws did major damage to the "clear and substantial interests" of the military retirement system?

Mr. AMIS. Mr. Chairman, we do not keep statistics on divorce and the results of divorce. We never have. We have never interfered in the family relationships in that close a manner. Consequently, we have no statistics that could confirm or deny an allegation of that sort or a charge of that sort.

Senator JEPSEN. General, would the Department of Defense experience serious administrative problems if it was required to honor State court orders to provide separate retirement checks to divorced spouses?

General TICE. I would think there would be some cost, as I mentioned in my testimony, associated with the administrative process. But we already honor garnishment actions by our finance centers and this would be an expansion of that.

Senator JEPSEN. Would you say the cost would be minimal or substantial or very substantial?

General TICE. The numbers I guess on the number of garnishment actions we have had run around 2,000 to 3,000 a year. I am not sure what dollar value we could place on that. But I would say it would not be high.

The difficulty would be that if the authorizing legislation were not clear as to the specific requirements or responsibilities that the Department of Defense had. If you left it open to interpretation, which has happened in the case of the Civil Service there have been some lawsuits with respect to the application of the law requiring the civil service pay to be disbursed to more than one party.

Senator JEPSEN. General, it seems to me there is a fundamental question of equity here. I have had a question posed here which points out the fact that we have already adjusted the rights of spouses of civil service retirees and foreign service retirees. What would it require for the military personnel to be treated differently, or why are they treated differently?

I am not sure exactly how to pose it. Maybe you can pose the question and answer it. Do you see what I am getting at? We have spouses of civil service retirees and foreign service retirees—without getting into the rightness or wrongness of the adjustments made, there have been some adjustments made.

General TICE. I think the only argument we would have is, unlike those two categories of personnel you have cited, there is a social security benefit provided for divorced spouses of the military. But as far as the administrative process, I do not think our ability to disburse that income to the two parties is a particular problem.

And when you ask me whether the cost would be high, I really do not think so, because I am not sure what the numbers are that would be involved. We do have some statistics through 1981 of the number of garnishment actions and that varies from 2,000 to 3,000 per year.

Senator JEPSEN. Do you have anything else, General?

General TICE. No; I think the Department of Defense appreciates your committee holding hearings on this issue, because those issues

involve the families of the military members who serve, and there is no way we can turn our back to these problems. I think a fair and open hearing here will lead to perhaps the best course of action you can choose that would be fair and equitable to all concerned.

I think in the final analysis we must recognize the uniqueness associated with military service compared to foreign service or civil service.

Senator JEPSEN. I thank you, General Tice, for your responses, for being very candid and open. I know it has been sometimes difficult to respond on a personal basis and trying to reflect accurately, which I feel you have, with regard to the administration's position on this.

You are a family man with 35 years of tenure in the marriage contract, and you certainly speak from the heart. I thank you and you will be hearing more from us. We will be looking forward to receiving the administration's final recommendations and so on, hopefully at or about as near as possible 30 days.

General TICE. Thank you, sir.

Senator JEPSEN. We have two more witnesses scheduled to testify—well, we have three, but two will testify at the same time. I think we will continue on. Rosemary Locke, president of the National Military Wives Association, and Nancy Abell, president of Ex-Partners of Servicemen for Equality.

Welcome to this subcommittee. You may, as you wish, summarize your remarks and request that they be printed in the record as if read, so the full context of your remarks will be entered into the record, or you may read them as you see fit.

STATEMENT OF ROSEMARY LOCKE, LEGISLATIVE CHAIRMAN, NATIONAL MILITARY WIVES ASSOCIATION, AND SUZANNE DAVIS, CHAIRMAN, DIVORCE STUDY GROUP, NMWA

Ms. LOCKE. Thank you. I am Rosemary Locke. I am no longer president of the National Military Wives Association. I am here today as legislative chairman. Sue Davis is the chairman of our divorce study group and she will be presenting the testimony.

Ms. DAVIS. I am Suzanne Davis of the National Military Wives Association. We wish to thank you very much for holding these hearings and allowing us to testify. I will summarize the testimony. The National Military Wives Association is a volunteer, nonprofit organization of wives, families, and members of the seven uniformed services. Our purpose is to inform and educate military families regarding their rights, benefits and privileges as part of the larger military family.

Because we are wives of military personnel, we are not only concerned with the plight of women who find themselves displaced homemakers after years of marriage, but we are also greatly concerned about maintaining a strong military which will defend our American way of life and reflect credit on our Nation.

Military life is special, and there are many benefits for families. But there are also sacrifices and contributions required. Remote and possibly hazardous duty assignments, long separations where the mother must preserve the family structure, stresses on the children and

the real possibility that the service member could lose his life in the service of his country all confront the military family at some time.

Although the mother may prefer the traditional role of homemaker, she may be required to supplement the family income. Recent studies confirm that the working military spouse contributes a greater proportion to the family income than does her civilian counterpart. While the recent pay raise has helped us considerably, it is almost impossible to catch up with losses incurred in past years.

Because of frequent moves, the military spouse is at a disadvantage. Although the labor force participation rate is equal, the unemployment rate for service wives is twice that of civilian wives. She is often required to begin each new job in an entry level position, regardless of skills or experience. And if she is one of approximately one-half million dependents living overseas, there may be no jobs available.

Finally, because 90 percent of women are employed in low-level jobs, they earn low-paying health and/or retirement benefits or simply do not qualify for any pension at all. Only 13 percent of all women actually receive their own retirement benefits. And the cost of private health insurance is prohibitive. Allstate, for example, charges $123 per month for a policy which does not include outpatient care or medication. It is extremely difficult for the military spouse to establish her own economic base.

Not only does her family rely upon her for support, but frequently the service spouse is called upon to support various aspects of military life. Last year alone, over $14 million was raised and distributed by Navy Relief Society volunteers to servicemen and women in need. Countless hours have been given to the Red Cross, thrift shops, and both civilian and military hospitals. These activities are not always entirely voluntary.

However, the vast majority of military spouses give their time and energy willingly and enthusiastically. They believe that their contributions are significant and they take pride in their families, their husbands' careers, and their country.

It is difficult to understand, therefore, how the contributions of these women are suddenly negated in the unhappy event of divorce, how in spite of any hardship they may have endured all medical, CHAMPUS, commissary, and PX benefits are lost.

We believe that marriage is a partnership both socially and economically and that each partner has a stake. In many cases military retirement pay is the single greatest asset accrued during the partnership. The community property States and many equitable distribution States agree, holding that both private and military pensions are property subject to division in the event of the dissolution of marriage.

Social security benefits are available to the wife upon divorce. However, this provides an average of only $225 a month and is available only after the husband actually retires and starts drawing social security benefits himself; 70 percent of all women who collect social security are still eligible for welfare.

In June of this year, the Supreme Court ruled that military retirement pay was no longer subject to division as property. A portion of it, however, could be used in most cases to pay spousal or child support. At the same time the Court refused to hear two additional cases chal-

lenging the division of private pensions, thereby upholding the States' rights to divide private retirement benefits.

It has become possible in the community property States, therefore, for a wife to share a private pension with her former husband, while he would not be required to share his military benefits with her. We find it difficult to understand why the military wife is being singled out for treatment different from her civilian sister.

The alternative to property settlement, spousal and child support, is awarded by the court on the basis of need and ceases when the provider dies. Only 4 percent of women collect alimony, and frequently it is of fixed duration, lasting only about 25 months; two States prohibit spousal support awards altogether.

Although 98 percent of single-parent families are headed by mothers, only 22 percent actually receive child support payments. It is clear that collection of support payments is difficult. Courts enforce these awards by garnishing the service member's wages. This is deemed adequate protection for the former spouse, but there are many problems.

One State prohibits garnishment, one allows it only for retired pay. In some States the garnishment order must be renewed every 30 days or each time the provider is in arrears. Each court order may cost upwards of $500. In most cases the former spouse simply cannot afford the fees and gives up.

No States allow garnishment for arrearages and property settlements. A further complication arises when one State refuses to honor the full faith and credit clause of another, thereby refusing to enforce the support award the court awarded on and garnishment order.

In 1978 a law was passed allowing for the direct payment of court-ordered moneys for former spouses of career civil service personnel. Former military spouses need that same protection.

We believe that, because former military members were Federal employees, it is not unreasonable to support this provision regarding their pay. The various bills before the House and Senate subcommittees require court review. They require judgments to be based upon the individual merits of each case.

NMWA supports the following legislation: H.R. 1711, which is Mr. Hance's and which would allow for direct payment of court awarded moneys. We recommended that H.R. 1711 be modified so that the amount of direct payment be in accordance with the maximum garnishment limitations.

We support S. 888 and S. 3117, the Economic Equity Acts. It is important to note the economic equity acts do not preempt States' rights. The State can make any changes it desires.

We support S. 1453, Senator DeConcini's, to return to the States their rights to divide property. And we support H.R. 3039, which would provide former spouses of 10 years a pro-rata share of retirement and SBP subject to court review. H.R. 3039 would insure that a spouse or ex-spouse sign a waiver agreeing to the retiree's election to take a reduction in or opt out of SBP. This is an important feature for all wives, not just former wives.

Currently the decision to participate in SBP is made solely by the member shortly before retirement. A spouse is supposed to be notified of the retiree's decision not to subscribe to SBP or to do so at a re-

duced amount. In fact, many wives of retirees are uncertain as to whether their husbands have provided SBP protection for them or not.

It is important to note that even if a military member wishes to provide SBP for his former spouse, he is prohibited from doing so by law. He does not have that choice H.R. 1296 and H.R. 1540 would provide medical care for women married 20 years or more. This is an acute need for many older wives.

We feel strongly that these benefits should be extended to the National Oceanic and Atmospheric Administration and to the U.S. Public Health Service spouses who presently are not eligible.

Finally much has been said about retention, and it is a very important issue about which we are also concerned. I would like to share with you some of the following. From the Army Family Symposium:

Army families believe that commitment to an Army career is indeed reciprocal and that, unless their needs are heard and considered, the commitment cannot be continued.

From Families in Blue:

The most important factor related to retention decisions among married men and women is spouse support for an Air Force career. Without it, only 30 percent of men and 26 percent of women will still make a career commitment.

From the Army Times article in September:

A study of problems of attrition and failed retention in the Ready Reserve and National Guard has found that the attitude of spouses is the most important single factor in decisions to quit the service or reenlist.

And finally, from the Navy Leaders Family Manual:

In the case of a married member, and the figure approaches 90 percent among career personnel, the Navy reenlists not only the members but in fact the whole family. Married Navy members achieve promotion more rapidly. The family thus seems to contribute to, rather than detract from, a Navy member's performance.

NMWA is convinced that families have a greater effect on retention than any other single factor. We are also convinced that wives are more than willing to support the military, to give and to serve, if only they believe they are being treated fairly.

We also believe that most military men do honor their obligations, that men of integrity, surely the kind of men the military hopes to retain, would not leave his family in financial distress, would not object to direct payment, of court awarded moneys and would wish to have a choice in sharing the SBP.

Because of the long history of our country of strong military family traditions, all military wives urge you to recognize their dedication by passing legislation which would strengthen their commitment.

We want to thank you very much for allowing us to testify.

Senator JEPSEN. Thank you, your prepared statement will be entered in the hearing record.

[The prepared statement of Suzanne Davis follows:]

PREPARED STATEMENT OF SUZANNE DAVIS, NATIONAL MILITARY WIVES ASSOCIATION, INC.

The National Military Wives Association (NMWA) is a volunteer non-profit organization of wives, family members, active duty, and retired personnel of the seven uniformed services. We have members in all fifty states and at mili-

tary bases throughout the world. Our purpose is to inform and educate military families regarding their rights, benefits, and privileges as members of the larger military family and to make their views known to Congress. Members are kept informed through a quarterly newsletter and periodic workshops.

Because many of us are wives of military personnel, we are concerned not only about the plight of women who become displaced homemakers after many years of marriage, but are also greatly concerned about maintaining a strong, viable military which will defend our American way of life and reflect credit on our nation.

Military service means a special way of life for the military wife and family. While military life offers a sense of service, job security, and broadening experiences for the wife and children, the family is also called upon to make sacrifices. Remote and sometimes hazardous duty assignments, as illustrated last month by the ambush outside of Heidelberg of General Kroesen and his wife, long separations where the wife is solely responsible for preserving the structure of the family, and erosion of benefits either real or perceived are facts of life for most military families at some time during the member's military career.

There is the additional difficulty encountered by a wife who seeks to establish her own career. While moving on the average of every 2½ years may be socially and culturally enriching it becomes virtually impossible for the wife to establish a career which includes all the benefits of seniority, medical insurance, vesting in a retirement plan, and building the foundation of her own financial security.

Even if she does not wish to have a career, it may be difficult just to obtain employment. Although "the labor force participation rate of military wives soared in the 1970's, equal to that of civilian wives by 1979, the unemployment rate for the service spouse was more than twice that of the civilian wife," according to an article in "Monthly Labor Review", February, 1981.

The circumstances of military life may undercut the labor market success of many military wives. Besides the problems of balancing the demands of both a family and a job, many of these women are forced to start over at entry level positions each time they move, regardless of former experience. "It has been reported that some employers even deny job interviews to these women who they deem short-term workers," continues the same article.

"Additionally, military wives with children suffered from unemployment to a much greater extent than civilian mothers."

These figures do not even reflect the unemployment rates of women living with military husbands overseas where jobs may be virtually impossible to find.

A letter from the wife of an Air Force Officer sums up the feelings of many service wives.—"My husband recently put in his papers to retire. He is a Colonel in the Air Force, was moving up, but we felt it just wasn't worth it anymore. One of the reasons was the discrimination I have felt as a military wife trying to find employment.

"I have attempted to have a career these past 21 years. Without belaboring a point, let me say that I have started at the bottom at least ten times. Each move up for him was a step down for me. And certainly, I am not alone."

A Navy wife adds, "With a career, one expects to advance professionally as well as financially. This is not what happens to a wife who moves every 18 months to 2 years to accompany a service husband. I am a nurse with a masters degree and because of our last move took a $5,000.00 pay cut. That does not even include the cost of inflation, increased house payments, etc. I work full time and currently am paid approximately half of what nurses with my experience and credentials would make (I have been in nursing 20 years) who stayed in one place or who moved to further their own career. Finally, I am a service wife who has consistently worked in a demanding profession as well as coped with three children during the frequent absences of my husband, both in Viet Nam and on ship deployments. All three of our children were born during his absences. During these last 12 years my earnings have been substantially less than wives not subject to transfer, and I have not been in a retirement system."

Indeed, the needs of the service have always precluded consideration of the wife's desire or need to establish a career. In an interview with the Navy magazine, "Wifeline", then Master Chief Petty Officer of the Navy, Robert J. Walker, responded to the question, "Is it possible to keep men in one area for several years so that wives can develop their own careers?" by saying, "In reality, no. It depends on the individual's geographic area of tour. Also, this policy would infringe upon our sea/shore rotation." (In checking the current validity of this information, NMWA was told by the Master Chief Petty Officer of the Navy's

office that although the Navy is trying to establish a Homestead policy whereby families would be allowed to remain longer in one area, the above information is still correct.)

Unfortunately, obtaining a job or pursuing a career are not solely for the satisfaction and challenge involved. It has become necessary in the past few years for military wives to supplement the family income. Studies show that the military has lost 20% buying power since 19.2; that housing costs far exceed the amount allotted for housing; and that military families last year paid 1.2 billion dollars in out of pocket moving expenses for authorized moves. Some junior enlisted personnel are responsible for their own moves. Selling a home in today's market is expensive and difficult if not impossible. The benefits available to our civilian counterparts who also must move frequently include such advantages to the transferee as bridge loans, company paid house-hunting trips, healthy per diem checks, and outright purchase of the home by companies simply do not exist for military families. Incredibility, the moving allowance paid to a Civil Service employee can be 10 times greater than that paid to a serviceman of comparable rate, the GS–9 receiving $14,000 per move while the E–7 receives $1,400. Clearly, moving every 2–3 years during a 20–30 year career creates a substantial financial burden for the military family.

"Because their pay tends to be low, military wives who are employed, contribute a larger proportion of their family's income than do their civilian counterparts. Despite their contributions, average income for Armed Forces families was substantially below that for civilian families where both parents worked. In 1978, median income for all married-couple military families with children was $16,200 where the mother worked and $12,200 where she did not. Comparable income where the father was an employed civilian were $23,200 and $19,500 respectively."

While the recent military pay raise has helped considerably in dealing with this year's inflation rates, in reality it has not allowed families to "catch up" with losses incurred in past years.

But what about the wife who chooses the traditional role of wife and mother, who may spend much of her time in volunteer work? Does she still have this choice? Does her family have a choice in wanting the mother to "stay home"? Can she be secure in the knowledge that if she does choose to remain in the home that some financial security will be forthcoming in her later years?

The military community depends on these women, not only in social and leadership roles but for financial support as well. In 1980, alone, the Navy Relief Society, staffed 88 percent by volunteer wives, loaned over $14,000,000.00 to needy servicemen and women. Much of this money was also raised due to the efforts of service wives. The Ombudsman Program, designed to assist commands in answering questions, giving information, helping newcomers, and assisting families through periods when the serviceman is away, is also staffed by volunteer military wives.

Further, the service family is often used as a tool to express foreign policy commitments of the United States. Almost half a million American families serve overseas at any given time.

Service wives, although not employed by the military, are often expected to perform various functions. Such books as The Sailor's Wife, by Jean Ebbert; The Marine Wife, by Sally Jerome; "Guidelines for the Wives of Commanding and Executive Officers," by Navy Wifeline; "The Navy Leader's Family Manual," prepared by the Navy Family Support Programs Department of the Navy; "Families in Blue", A Study of Married and Single Parent Families in the U.S. Air Force by Dennis K. Orthner, Ph.D.; The Army Wife and The Air Force Wife by Nancy Shea all show that a military spouse is expected to support the military member and his service as well as her family.

In The Sailor's Wife, provided by the "Naval Institute" and distributed by the United States Navy recruiters, author Jean Ebbert states, "Your husband's job and the way you understand it and the way you help him do it to the best of his ability are important contributions to the Navy's strength. The United States relies on that strength."

"Guidelines for Wives of Commanding and Executive [illegible]cers" mailed by the Navy Department to all wives of prospective Commanding and Executive Officers says, "The dreams, the planning, the studying, the long hours, are all culminated in these orders. Now he has the long sought chance to command.

"But the thrill and challenge are not just for the officer receiving those orders. This is a unique time for his wife as well. This is her time to make a visible

and necessary contribution both to the Navy and to the country. She has a very important part to play in his success as a Commanding Officer. . . . She is a person set apart. She has heightened responsibility to her husband and to his career . . . a willingness to participate and graciously accept the responsibility begins it all. . . . In many commands the CO and his wife receive invitations to social activities in the local civilian community. . . . In each, the CO and his wife represent the Navy."

At a recent seminar, held at the Army War College in Carlisle, Pennsylvania, Army Officers stated that the role their wives played in volunteer work, social functions and contributions to their husband's careers were routinely mentioned in their Officer Evaluation Reports. "How else could we keep them doing all those things?" commented one officer.

"The Army Family: Analysis and Appraisal," sponsored by The Association of the United States Army and The Army Officers' Wives Club of the Greater Washington Area addressed among other issues, the role of Army Officers' Wives. It concluded, "Many Generals' wives have trained specialties but cannot work due to (military) obligations. The junior officer and wife look to the future and see more work, more responsibility, more social obligations with almost total loss of benefits.

"Families in Blue, A Study of Married and Single Family Parents in the U.S. Air Force," by Dennis K. Orthner, Ph.D., says in its opening paragraph, "No longer are families just dependents. They are now a vital part of the mission support system upon which the Air Force depends."

And finally, although the above quotations have suggested that a wife's role and how she plays it are extremely important to her husband's career in particular and to the military in general, the following illustrates the reality of it all.

Excerpt from U.S. Army Officer Evaluation Report: "Major _____ has performed in an outstanding manner. He has made improvements in the property accountability of his equipment intensive company and has improved customer relations with support units. His aircraft maintenance and supply experience have enabled him to make significant contributions to brigade aircraft operational readiness. When extra-duty work was required, he was quick to ensure that necessary supply or maintenance personnel were available. I must criticize his wife's antisocial actions which led to the disintegration of a group of wives who had been making significant contributions to the company and military community. I, therefore, do not recommend Major _____ for future assignments which will be affected by her behavior.

"Technical competence of the highest order. He and his wife did not try to maintain a previously active group of company officers' wives. They were counseled." The wife explained, "My participation or alleged lack, thereof, was so important it affected my husband's officer career. Therefore, if I am required not only to work in my chosen career but his also, then why am I not also entitled to half or part of the retirement benefits?

"Because I disobeyed a direct order to participate in distaff activities, i.e., work in the Thrift Shop, etc., my husband received a derogatory OER and he was counseled on what a good marriage was. The man and wife are in it together and she gives up more than a little bit of herself. Some kind of compensation appears appropriate even though the marriage is called off toward the finish line.

"I'm far from calling off ours, but my experience supports the case of women who are."

"We recruit soldiers; but we retain families," says General Edward C. Meyer, Chief of Staff of the Army.

Over and over again, especially in the last few years as traditional family structures have evolved, studies have pointed to the importance of spousal support in influencing the member in his choice to continue in the military. Older couples, more senior military members, and their wives tend to believe in the traditional values of husband eladership, separate family responsibilities and the primacy of motherhood for women and work for men. In ⅔ of Air Force families, at least one spouse refutes this traditional view. "Younger men and women are not as willing to sacrifice the interests of their families for their Air Force career as perhaps was an earlier generation.

"Since the majority of Air Force members are married, the most important factor relating to retention decisions among married men and women is spouse support of an Air Force career. Without that support only 30 percent of men and 26 percent of women still make a career commitment. Spouse support is

particularly important among younger enlisted and officer members since these marriages are more likely to have nontraditional family values with more shared decisionmaking. This means that spouse support may be even more important in the future. With spouse support so vital to the career of many Air Force married members, the factors that influence spouse support take on special significance. Seventy percent of men who plan to make a career out of the Air Force have partners who support that decision," according to "Families in Blue."

In the Marine Corps Family Service Program Manual, December 28, 1979, General R. H. Barrow, Commandant of the Marine Corps stated, "Few would argue the importance of the family institution in our daily lives. Whether married or single, a favorable relationship has a powerful impact on morale and performance of each of us. The fact is that the well-being and quality of life of our Marine Corps family contributes directly to our readiness.

"Families of Marines play an important role in the ultimate accomplishment of the Marine Corps mission. The degree to which Marine families' needs and expectations are met certainly affects and is often times a pivotal factor in retention, job performance and absenteeism."

"The Navy Leaders Family Manual" also addresses the role of the spouse in the member's decision to continue in the military. "In the case of a married member, and the figure approaches 90 percent among career personnel, the Navy reenlists not only the members, but in effect the whole family as well. Married Navy members achieved promotion more rapidly. The family thus seems to contribute to rather than detract from a Navy member's performance. The family has a great need, as does the member for a feeling that the many sacrifices are 'worth it.' Many factors contribute to satisfaction with the Navy. Often mentioned are a sense of mission, the feeling that good work is appreciated, and a belief that the family's future is provided for."

In the Editors note of "The Army Family," it says, "A reciprocal relationship exists between the Army and the families of its members, the quality of that relationship has a significant impact on both organizational effectiveness and family stability.

"Army families believe that commitment to an Army career is indeed reciprocal and that unless their needs are heard and considered, the commitment cannot be continued."

As an example of how family considerations, often dealing with a wife's career pursued whether out of a desire to work or more often because of a real financial need, actually affect the military. A study by the Army Family Symposium workshop relates that, "At all levels service personnel are electing to go on tours unaccompanied by the family so that the wife's career and/or family life will not be interrupted. Increasing numbers of mid-level career persons are leaving the service and turning down key career developing assignments because of family considerations.

"This loss of mid-level leadership is viewed as a contributing factor to the increase in disciplinary problems and a decrease in the pride and tradition historically associated with an Army career." . . . Army Family Symposium.

Lest it seems that the only sacrifices the military spouse is concerned with are financial, it is essential to note that there are more subtle issues here.

How does constant relocation affect families? What is the effect on children of continually changing schools? What stresses are placed on the children due to prolonged absences of their father? In reality, what civilian families must face the possibility of their husband and father's death as many military families must do? (Note: Over the past three years, the author attended memorial services for 28 Navy men all under 35 who died in the line of duty leaving a total of 31 children.)

The burden of dealing with these stresses falls on the mother. Not that we underestimate in any way the degree of the father's love, concern and support for his family, but often times the military man, due to deployment or TDY, simply is not there.

A recent study by Dr. Eli Breger, Chief of Psychiatry Service at Naval Hospital in Beaufort, S.C., reported in "Military Family," published by Military Family Resource Center of the YMCA, found that, "A father's prolonged absence increases the probability for developmental difficulties in his children. It is certainly a significant psychological stress for developing children and is especially true for the male child . . . it is a crisis challenging the family's adaptive capacity and at times threatens its very integration." He continues, "The effects on children of the father's absence in large measure reflects the mother's adjust-

ment to her husband's absence. . . . She should be prepared to involve herself in her son's activities to the best of her ability. In so doing, the mother is expanding her parental role into a dual role, being both a mother and to a large extent a father to the children."

It is clear that wives are expected to act in this dual role as father and mother whenever necessary, to supplement the family income if needed, to support and contribute to their husband's careers, and to pursue their own interests. The services not only recognize this, they require it in ways both subtle and direct.

The great majority of military wives and mothers do these things every day. They perform their duties willingly and enthusiastically. For the most part, they believe their contributions to be significant, and they feel pride in their families, their husbands' careers and their country. They do not accept the idea that these contributions count for nothing in the social and economic partnership of marriage.

It is difficult to understand, therefore, how the contributions of many wives are suddenly negated in the unhappy event of divorce. While we are aware that some wives do not enrich their husbands' careers, as some husbands do not enrich their families, it is not our intention to place blame.

We believe that marriage is a partnership both socially and economically, that while the military lifestyle offers unique advantages, it also requires special sacrifices and contributions not necessary to civilian life. And we finally believe that a young wife weighing her future as a partner in service to her country will question why so much is demanded of her when she has been denied a stake in that partnership should her marriage dissolve at some future date.

The future of a former service wife may be bleak indeed. The day the divorce decree becomes final she loses all medical, PX, commissary, and CHAMPUS privileges even if she is seriously ill and without her own health insurance. Federal law denies her a portion of her husband's Survivor Benefit Plan even if he wishes to provide it for her. In order for him to provide future security for her should something happen to him, he must pay for an expensive insurance annuity. And to add insult to injury, her former husband's new spouse, should he remarry, will be entitled to all military benefits even if she becomes his wife following his retirement.

Aside from being a difficult, emotional occurance, divorce is usually financially devastating to the woman. Recent studies show that:

Only 14 percent of all divorcees are awarded alimony, and only (⅓) 4 percent actually receive it.

Two-thirds of all alimony awards are fixed duration, ending after approximately 25 months.

Eighty-nine percent of single parent families are headed by mothers, only 22 percent of these families receive child support payments.

Only 13 percent of women collect pension benefits of their own.

On the average, divorced men are allowed to retain 2–3 times as much disposable income as the court allows their former wives.

In addition, medical care and/or health insurance costs may be prohibitive. According to Blue Cross, a private health-care insurance policy costs between $41.00–$62.00 per month, is only available to a woman with no pre-existing medical conditions, and does not cover office visits or medication costs. All-State Insurance private plans cost $123.00 per month while the same restrictions apply. This does not take into consideration the routine medical needs of many older Americans. A woman with hypertension and a vitamin deficiency, for instance, could easily spend between $800.00–$900.00 per year on preventive medication and care alone.

Very often, for military families, the only property acquired during marriage is the military retired or retainer pay. In addition, the servicemember has acquired valuable job experience that he can market following retirement. The wife, however, by virtue of her military life, may well have lost her marketable skills The situation is further compounded by the fact that 90 percent of women are employed in low level, low paying jobs, (i.e. clerks, witnesses, salespersons) and are therefore only able to vest in low paying benefits.

In the event of divorce, the woman is usually provided for in one of two ways. Spousal support (and child support if applicable) based on need and property division based on the assumption that she also contributed to the assets of the partnership. The former spouse is entitled to a share in her husband's social security benefits, but only after he is completely retired and collecting it himself.

This may be many years after the divorce and even then amounts to an average of only $225.00 per month. Seventy percent of women receiving this benefit are still eligible for welfare. In property settlements, most states, 38 in all, are equitable division states. They usually rely on the discretion of the judge to evaluate each case. State law may or may not consider retirement benefits to be marital property, although some may award alimony to be paid from retirement benefits. Of these states, Arkansas, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey and Wisconsin divide retirement benefits. Three states, Alaska, Colorado and Indiana will not allow division of military pensions, but will divide private pensions. There are eight community property states, California, Texas, Arizona, New Mexico, Idaho, Louisiana, Washington, and Nevada. These states take the approach that property accumulated during the marriage is community property. They usually divide retirement pay.

Finally, there are five separate title states, Florida, Mississippi, New York, Virginia and West Virginia. These award property to the person in whose name it is titled. Generally, these states do not award property rights in retirement benefits.

It is clear then that divorce laws vary considerably from state to state and even from court to court. Also divorces are awarded in the state where they are brought to court notwithstanding the permanent residence of the parties involved.

The woman will usually be awarded either support payments or property settlement depending on the laws of the state.

Spousal support, as opposed to property settlement, is usually awarded for a limited period of time. In New Hampshire retirement benefits may not be touched even for child support. In Nebraska, Ohio, Oklahoma, South Dakota, Tennessee, and Vermont pensions may be attached for alimony.

If she is awarded spousal support or child support and her former husband does not honor his obligations to continue this award, his wages may be garnished by the court. However, this is not as straightforward as it may seem. North Carolina does not allow garnishment. Texas does not allow garnishment of active duty pay, only retired pay. Pennsylvania does not allow spousal support or property settlements so there is nothing to be garnished. Furthermore, garnishment is permitted for child and spousal support only, therefore, a woman awarded a property settlement could not enforce that award in the event her husband stopped sending her the money.

There are further problems in some states. Garnishment must be renewed every 15–30 days and may cost up to $500.00 each time the court order is renewed. In addition, the Soldiers and Sailors Relief Act may require that a former wife pay the legal fees for her husband even when she is in court for reasons of non-payment.

Garnishment is clearly not the answer. NMWA supports the Hance (H.R. 1711) legislation which would allow for direct payment of court awards. This is essential if the former spouse is to receive what the court has provided for her. It would seem to be a convenience to the servicemember. Surely if an allotment can be made to pay off a car loan, an allotment could be made to ensure the spouse's support. In 1978, Public Law 95–369 was passed allowing direct payment of court awarded monies to former spouses of Civil Service members. We believe that former military spouses should be afforded the same protection.

The June 26, 1981, Supreme Court decision in McCarty v. McCarty struck a mortal blow to the division of property in the case of military pensions, when the Court overrode traditional state supremacy in family law. The Court had earlier refused to hear several cases involving division of private pension plans in community property states. "The fact that states continue to divide private company pensions as they see fit while reserving military pensions solely for the worker who earned it is a slap in the face to every military wife. Most states have evolved an economic partnership theory of marriage under which a wife who cooks, cleans, and raises the children (in addition to the contributions cited above) is "earning" a share in the marital assets as a matter of right." "A Housewife's Lot," Jane Bryant Quinn, Newsweek, September 14, 1981.

The Court held, however, that the military was different, that there were special circumstances that caused the servicemember and his spouse to be singled out for different treatment. The Court stated that retirement pay was as much a management tool as an income maintenance method and concluded that retirement pay could be used for a spouse based on need but could not be divided as a property settlement. "The Congress has recognized the right of the spouse to invade Army retired pay based upon her need, but it has not recognized her

right to do so based upon her property interest in such pay. The aggressive use of community property awards of military retired pay has been prompted by the inability of ex-spouses to enforce support awards." (Brief Amici Curiae on behalf of certain members of Congress and organizations in support of appellee). So there she is—unable to share in property accrued during the partnership and unable to collect the spousal support awarded by the court.

The court also stated that while the plight of a former service spouse was a serious one, it was not ultimately up to the court to decide. It is the responsibility of the Congress. Congress has done that in several instances by providing compensation for widows and by passing H.R. 4674 to ensure a pro-rata share of retirement pay for Foreign Service wives. Former military wives need that same consideration. The Court also expressed that to divide retirement benefits would have a negative affect on retention. NMWA believes that wives have greater effect on retention than any other single factor and we believe that young wives today are aware that the refusal to divide retirement pay is a direct affront to them.

We also feel that because military members are Federal employees it is not unreasonable to support Federal legislation regarding their pay.

The various bills before House and Senate Subcommittees call for court review of these pension sharing cases. They require that judgments be used on the individual merits of each case.

We support the following legislation:

H.R. 1711, introduced by Mr. Kent Hance, "would authorize the Secretary concerned to comply with the terms of a court decree, order, or property settlement in connection with the divorce, annulment, or legal separation of a member or former member of the uniformed services receiving retired or retainer pay." H.R. 1711 would . . .

Permit direct payment of a court award to a former spouse, thereby eliminating the costly or sometimes nonexistent garnishment process.

Permit current former spouses to receive direct payment of court awards. (It would not apply to payments in arrears.)

H.R. 1711 does not address:

The need of survivor's benefits protection, particularly crucial to older, former spouses of a long term marriage.

The significant variation in state laws which may prohibit a court from awarding alimony or pension sharing.

The need for direct payment of court awards to former spouses where the service member is still on active duty.

NMWA supports H.R. 1711 and recommends that it be modified so that the amount of direct payment be in accordance with the maximum garnishment limitations (581.402). NMWA further recommends that active duty pay of members of the uniformed services be subject to direct payment upon a valid court decree.

S. 1453, introduced by Senator DeConcini, would "provide for the disposition of the retirement benefits between members and former members of the Armed Forces and their spouses."

S. 1453 would allow states to treat retirement pay of members of the Armed Forces in divorce matters in accordance with state laws prior to the McCarty decision.

S. 1453 has no provision for direct payment of court orders. Like H.R. 1711, S. 1453 does not address the issues of survivor's benefits or the variance in state laws which may prohibit the award of alimony or division of pensions.

S. 888 and H.R. 3117, the Economic Equity Act, is a comprehensive economic rights package encompassing 11 major legislative areas. One area, also introduced as H.R. 3039, by Mrs. Schroeder, deals with pension reform and "would provide former spouses of military personnel, both male and female, married at least ten years, a pro-rata share of the retirement and survivor's benefits, subject to courts review." (Congressional Record—Extension of Remarks, April 30, 1981)

H.R. 3039 would:

Be a suggested guide for states to use in determining divorce court awards which could be modified by a spousal agreement or court order depending on the merits of each case.

Insure that a spouse or ex-spouse sign a waiver agreeing to the retiree's election to take a reduction in or opt out of SBP. This is an important feature for all wives, not just former wives. Currently, the decision to participate in SBP is made solely by the member shortly before retirement. A spouse is supposed to

be notified of the retiree's decision not to subscribe to SBP or to do so at reduced amount. In fact, many wives of retirees are uncertain as to whether their husbands have provided SBP protection for them or not.

Eliminate the confusion and uneven judgments created by the significant variance in state laws.

H.R. 3039 would not be retroactive and does not address the problems of those already divorced.

NMWA supports H.R. 3039 and the similar provision in S. 888, Subchapter III.

None of the bills address the issue of health care for spouses of long term health condition, H.R. 1296 (Burton) and H.R. 1540 (Whitehurst) address the marriages. This is an acute problem for older women or those with a serious medical needs of a former spouse of a 20 or more years marriage. NMWA requests that this committee will at another time have hearings on this subject.

NMWA believes that most military men do honor their obligations. We believe that men of integrity, the men the military hopes to retain, would not leave their former spouses in financial distress, that they would not object to direct payment of court awarded monies, that they wish to have a choice as to sharing SBP benefits with their former wives.

Because of the long history in our country of strong military family traditions, all military wives urge you to recognize their dedication to their husbands, the military and their country by passing legislation which would strengthen their commitment.

Senator JEPSEN. Ms. Abell.

STATEMENT OF NANCY ABELL, PRESIDENT, EX-PARTNERS OF SERVICEMEN FOR EQUALITY, AND SHIRLEY TAFT

Ms. ABELL. I would like to thank you, Senator Jepsen, for allowing us to testify today. And I would like to thank the National Military Wives for giving us some of their time.

Mrs. Shirley Taft will present our testimony.

Ms. TAFT. Thank you. I am here today with Mrs. Nancy Abell, President of our organization, Ex-Partners of Servicemen For Equality. This is an organization composed of former spouses of both officers and enlisted personnel of the Armed Forces of this country. The purpose of our organization is to alert Members of Congress of the need for legislation to correct the injustice to ex-military spouses caused by the loss of military benefits in the event of divorce.

We would like to briefly acquaint you with the problems of today's older military ex-spouse, one in her late 40's to 60's, technically the displaced military homemaker. Truly, it is impossible for a military family to accumulate any savings or assets. But because of the retired pay and other benefits, survivor benefits, medical and commissary and so forth, the military wife coped with the hardships of military life. She was constantly reminded of the pot of gold at the end; retirement.

Only at divorce does she realize that all the gold goes only to the military man. She has no right to any benefit. Consequently, because of nofault divorce, changes in our society and the acceptance of divorce by today's military community, more and more dedicated military wives of 20 to 30 years of military marriages are finding themselves financially and emotionally abandoned by their military husbands and most State courts.

Present military laws as applied to dependents were written at a time in our society when divorce between military couples was rare. Wives who would normally have become widows are now fast becoming divorcees, and so the older military wife is truly a victim of society. Our laws must be changed to provide for this military wife, who gave

so much to her military husband, family, and country, and who receives no financial reward from her country in return.

Present military law provides quite well for the military retiree. Statistics would probably show that the average age of retirement is around 40. The military man retires with a guaranteed lifetime income. He is young enough and skilled enough, because of his military training, to pursue a second career which in many cases provides him with a second pension, survivors benefits and medical care for another 25 years.

This security is shared as long as the marriage lasts, but in the event of divorce, the wife, who has dedicated years to homemaking, finds herself literally bankrupt when she learns that her years as a military homemaker are not worth a penny.

With so many women working today, chances are that a young second wife is working and has her own pension, medical benefits and so on. So in fact a retiree with a working second wife could possibly have triple security. Thus a second wife may be very well cared for, while the first wife, a full-time military homemaker, has little or nothing.

Certainly there is grave injustice in laws that provide for only one partner to a marriage and completely ignore the other partner.

Today only 4 percent of divorced women receive alimony, which in many cases is not adequate, and worse yet, alimony dies when the husband dies. Our statistics indicate that most State courts do not order an insurance policy to secure alimony or child support. It is because of this that the survivor benefits law must be changed to return the annuity to the wife who was the wife at the time of retirement and therefore was the named beneficiary of the SBP.

Part of the legislative history of the survivor benefit plan, taken from the Congressional Record in the Senate, September 8, 1972, indicates the intent of Congress was to provide an annuity for the wife who stood alongside her husband throughout his military career. It is incredible that when the law was finally written it deliberately eliminated this wife as beneficiary in the event of divorce.

Furthermore, the plight of the military wife was recognized as serious even back in 1899 when Congress passed a general law which provided that a pensioner who deserted his wife for over 6 months must give up one-half of his pension to his wife. Of course, there was no retired pay back in 1899.

It seems, however, that Congress recognized the financial position of a wife left with nothing and so made her the responsibility of the military man. Many of today's divorced military men who object to providing for an exwife by sharing the retired pay seem to prefer that the wife be the responsibility of the American taxpayer through welfare when the wife has nothing.

The law of March 3, 1899—and we have attached an excerpt from this law to our testimony—also provides benefits only to those wives who were married to the serviceman during his years of military service. The reason, to quote the law:

> It is intended to stop the common abuse found in the marriage of young women to aged soldiers for the sake of acquiring a pensionable status.

It is ironic that the same situation exists today, 82 years later. The attitude of today's taxpayer seems to be that no one should

receive financial rewards unless they have worked for them. The ex-military wife who has contributed 20 or more years to volunteer service, entertaining, raising children all over the world, and standing alongside of her husband throughout his military career, feels she has worked for her benefits and feels she should be allowed to retain all benefits in the event of divorce. The law must be changed to provide this.

In conclusion, we want to note that we do support the bills before you today that you are discussing, the Senate bill 1453, Senator DeConcini, House bill 1911, which Mr. Hance has proposed, House bill 3039, and House bill 1540, Mr. Whitehurst's.

And this is the bill which would provide for medical care. In the event this bill should be considered, we want to say that we wholeheartedly approve, and we cannot stress enough the need for medical care for those women who have cancer, heart conditions, and other debilitating illnesses and who are uninsurable.

If our Constitution does in fact provide for equality and justice, military laws regarding dependents must be written to provide for the ex-military wife, because present military laws do not treat her equally. We have faith, Mr. Chairman, that you and the subcommittee will do everything in your power to compensate the dedicated military wife for her contribution to her country.

We thank you for having let us come today and speak to you.

Senator JEPSEN. Thank you; your prepared statement will be inserted at this point in the hearing record.

[The prepared statement of Shirley Taft follows:]

PREPARED STATEMENT OF SHIRLEY TAFT, EX-PARTNERS OF SERVICEMEN FOR EQUALITY

Mr. Chairman, and members of the sub-committee, I am Mrs. Shirley Taft. I am here today with Mrs. Nancy Abell, President of our organization, Ex-Partners of Servicemen for Equality, which is an organization composed of former spouses of both officers and enlisted personnel of the Armed Forces of this country.

The purpose of our organization is to alert members of Congress of the need for legislation to correct the injustice to ex-military spouses caused by the loss of military benefits in event of divorce. We would like briefly to acquaint you with the problems of today's older military ex-spouse (one in her late 40's to 60's) . . . technically the "displaced" military homemaker.

Because of the numerous moves required by the military member's frequent "change of station," due to official orders (as many as 15+ in a 30 year career), it was impossible for us to hold a job that would have allowed us to build a pension in our own name. In addition, it was frowned upon by the military establishment for a military wife to work back in 1940–1960. She was supposed to be at her husband's side, support him in every way (i.e., keep up his morale, relieve him as much as possible of home and family responsibilities) so that he could "totally devote" his time (24 hours a day) and efforts to the "defense" of this country.

Truly, it is impossible for a military family to accumulate any savings or assets. But . . . because of the retired pay and other benefits (i.e. Survivor, Medical, Commissary, Etc.) the military wife learned to cope with the hardships of military life because she was constantly reminded of the "pot of gold" at the end . . . retirement. Only at divorce does she realize that all the gold goes only to the military man. She has no right to any benefit.

Consequently, because of no-fault divorce, changes in our society, and the acceptance of divorce by today's military community, more and more dedicated military wives (of 20–30 years of military marriages) are finding themselves financially and emotionally abandoned by their military husbands and most State Courts.

Present military laws (as applied to dependents) were written at a time in our society when divorce between military couples was rare. Wives who would normally have become "widows" are now fast becoming "divorcees," and so the older military wife is truly a victim of society. Our laws must be changed to "provide" for this military wife who gave so much to her military husband, family and country and who receives no financial award from her country in return.

Present military law provides quite well for the military retiree. Statistics would probably show that the average age of retirement is around 40. The military man retires with a "guaranteed lifetime income," free medical care, V.A. Home Loan, free burial (also for his wife), etc., is young enough and skilled enough (because of his military training) to pursue a second career which in many cases provides him with a second pension, survivor benefits and medical care for another 25 years. This security is "shared" as long as the marriage lasts but in event of divorce, the wife who has dedicated years to homemaking finds herself literally bankrupt when she learns that her years as a military homemaker are not worth a penny!!

With so many women working today, chances are that a second wife is working and has her own pension, medical benefits, etc. So, in fact, a retiree with a working second wife could possibly have triple security. Thus, a second wife may be very well cared for while the first wife (a full-time military homemaker) has little or nothing.

Certainly there is grave injustice in laws that provide for only one partner to a marriage and completely ignores the other partner.

Today, only 4% of divorced women receive alimony which, in many cases, is not adequate and worse yet, alimony dies if the husband dies. Our statistics indicate that most State Courts do not order an insurance policy to secure alimony, child support, etc. It is because of this that the Survivor Benefits law must be changed to return the annuity to the wife who was the wife at the time of the retirement and therefore was the named beneficiary of S.B.P.[1]

Part of the legislative history of S.B.P., taken from the Congressional Record, Senate, September 8, 1972, indicates the intent of Congress was to provide an annuity for the wife "who stood alongside her husband throughout his military career."[2] It is incredible that when the law was finally written it deliberately eliminated this wife as beneficiary in event of divorce.

Furthermore, the plight of the military wife was recognized as serious even back in 1899 when Congress passed a general law which provided that a pensioner who deserted his wife for over 6 months must give up one-half of his pension to his wife.[3]

Of course there was no "retired pay" back in 1899. It seems, however, that Congress recognized the financial position of a wife who was left with nothing and so made her the responsibility of the military man. Many of today's divorced military men who object to providing for his ex-wife by sharing his retired pay seem to prefer that the wife be the responsibility of this american taxpayer . . . through welfare when the wife has nothing.

The law of March 3, 1899, also provided benefits only to those wives who were married to the serviceman during his years of military service. The reason . . . to quote . . . "It is intended to stop the common abuse found in the marriage of young women to aged soldiers for the sake of acquiring a pensionable status."

It is ironical that the same situation exists today . . . 82 years later.

The attitude of today's taxpayer seems to be that no one should receive financial rewards unless they have worked for them. The ex-military wife (of a 20+ year military marriage) who has contributed years to volunteer service, entertaining, raising children all over the world and "standing alongside her husband throughout his military career, etc, feels she has worked for her benefits and feels she should be allowed to retain all benefits in event of divorce. The law must be changed to provide this.

In conclusion, we want to state our position on the bills before this subcommittee today.

S. 1453—DeConcini: We would like to see this bill approved as quickly as possible. It is desperately needed to correct the chaos that has resulted because of the McCarty decision.

We would like to see this bill as a Uniform Federal Law that would treat retired pay the same in all 50 states.

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[1] See S.B.P. Election Certificate.
[2] See pages 28911 and 28912 from The Congressional Record, Sept. 8, 1972.
[3] See pages 120 and 121 from "Military Pension Legislation," vol. XIII, No. 3, by William H. Glasson.

H.R. 1711—Hance: Again we strongly urge the sub-committee's approval of this bill which will do so much for so many "stranded" ex-wives and children. It would assure them that they will be able to pay the rent and eat. The court order will be upheld.[4]

H.R. 3039—Schroeder: We support this bill for what it will do for the future military divorcee. We want to stress that every consideration should be given to making it retroactive to alleviate the serious financial distress of so many women who are already divorced and really suffering.

Also, we strongly object to the provision re: S.B.P. which requires the approval of the second wife in order for the military man to provide an annuity for the first wife.

Where there is a need, the court must be given the authority to make this decision. The court would, we hope, be neutral, not emotional as would be the parties.

H.R. 1540—Whitehurst: In the event this bill should be considered, we want to say that we wholeheartedly approve and can't stress enough the need for medical care for those women who have cancer, heart conditions and many other debilitating illnesses and who are uninsurable.

The military wife of a 20+ military marriage who enjoyed free medical care as a wife and who finds herself at age 50+ with either no medical coverage or if she has coverage, she is forced to pay a high premium.

If our Constitution does in fact provide for Equality and Justice, military laws regarding dependents must be written to provide for the ex-military wife because present military laws do not treat her equally. We have faith, Mr. Chairman, that you and this subcommittee will do everything in your power to compensate the dedicated military wife for her contribution to her country.

We thank the Senators and Representatives who have introduced this necessary legislation and we thank you, Mr. Chairman, and all members of this subcommittee for giving us this opportunity to present our case before you today.

Senator JEPSEN. I will address this to anyone presently testifying here. Immediately after the McCarty decision was issued, there was a great deal of publicity about the large number of servicemen who were threatening to go back into the courts to obtain approval for stopping annuity payments they were making to exwives.

Do you have a firm indication, does anyone have a firm indication, how many servicemen were successful in doing this? Do you have any information on that?

Ms. ABELL. Senator, there have been many contempt cases which have been heard in California, Texas, and Arizona. There seems to still be a great deal of confusion as to how they are going to handle this. The rulings we have heard so far have been in favor of the wife. We understand in the State of Arizona, because they do have alimony there, that many of the judges are increasing the alimony in lieu of the division of the retirement pay right now.

There have been many threats made on our members by their former husbands, men who have deliberately stopped paying these women, saying they will not give them one more penny because of the *McCarty* decision. They have threatened them if the wife seeks legal advice to try to correct this matter, and in some cases their lives have been threatened.

I would like to say, because of this *McCarty* decision we have many women being evicted, women who are forced to sell their homes, women applying for welfare, and women getting food stamps. And I would really like to see this committee treat this legislation as emergency legislation to relieve the suffering of these women.

[4] See article from Washington Post Saturday, June 6, 1981, p. A6, . . . "Runway Fathers."

Senator JEPSEN. I can assure you that the subcommittee intends to move with dispatch to arrive at some resolution for this, and we will do everything we can to expedite the cooperation of reports from the present administration. Even though they said 30 days, I tried to, as you may have noticed, identify that pretty specifically. I did not intend to take them off guard, but I do intend to follow up on that.

Because I too feel that it is a situation which dictates immediate action. It is hard to understand. We need to do something about it.

Suppose after 20 years of marriage and military service a divorce ensues. The service member chooses to remain on active duty indefinitely for an additional 10 or 20 years. How would the exspouse survive during the interim? How will this legislation help the spouse in the situation I have just described?

I have not seen anything in any of these pieces of legislation that addresses that.

Ms. ABELL. You are asking, if the legislation is passed, how it will affect the older divorced spouse?

Senator JEPSEN. No; my question is, and I will try to restate it: We have legislation here, these proposals. But we do not detect in any of these proposals whether, if a divorce ensues after a person is retired and he then elects to continue on, reenlist and therefore postpones actual retirement benefits—there is not really anything provided for that 10 or 20 years they would have to wait, even though there was an award made for retirement.

Is there in any of these legislations?

Ms. LOCKE. I think you are correct, Senator. It is something we did not take into account. One of our concerns was, that the *McCarty* decision caused a great deal of concern among active duty wives who probably had not considered what could happen to them if their marriage ended in divorce.

We were concerned that none of the pieces of legislation covered all of the problems, and that is why we supported a number of these bills and recommended, for example, that the direct payment provision be extended to the active duty pay, because many of the ex-wives and children were not covered under this legislation, and we knew the *McCarty* decision was not adequate protection for them.

To answer your question I believe you are correct, in the event that a retiree went on to a second career and deferred receiving retired pay, the spouse would have to wait until his final retirement.

Senator JEPSEN. Ms. Locke, I will ask you the same thing I asked the attorney Senator we had here. Why cannot State courts rely upon alimony and child support to insure that service members fulfill their responsibilities to their their ex-spouses and children?

Ms. LOCKE. I would almost rather defer that to Mrs. Davis. But in her study—and I will let her comment—we find that many States do not award alimony. It is strictly a property settlement situation.

Sue?

Senator JEPSEN. Ms. Davis?

Ms. DAVIS. That is true. And of course, garnishment is not allowed for a property settlement, and I think there are three or four States that do not allow alimony.

Ms. ABELL. Senator Jepsen, I would like to make a comment. We would very much like to stress the need for a Federal law. We really

need this uniform law to prevent the shopping around that our opponents so often refer to. They are saying it is very easy for a wife to go to a State like California to seek a divorce while the man is overseas. On that same line, the men are doing the same thing. They are running to States like Virginia and Texas to obtain these divorces.

If we had a uniform divorce throughout this country where the wife would be treated fairly and equally in all of these decisions, this would not be happening. Men would not request transfers to certain States that would be beneficial to them in the event of a divorce. And we know this is happening.

Our organization has testified in Richmond, Va. They are considering an overhaul of their divorce laws. Virginia is fast becoming known as a dumping ground for military wives. And we would really strongly urge that the committee consider Federal legislation to prevent this, to insure that women are granted equal care in the event of divorce, equal treatment.

Because like in the State of California, she could be given a share of the retirement pay plus alimony; and in the State next door she might be lucky to come out with $200 a month after a 30-year marriage. And this is not fair.

We have also known, judging from our members—and we have well over 2,000 members—that women are not being treated fairly in the divorce courts. It seems to depend upon the integrity of the attorneys, the whims of the judges. And we have proof that there is much lying going on in the State courts.

It is not adequate. The women are not being properly taken care of in the State courts. And I cannot stress enough the need for a Federal divorce law.

Ms. LOCKE. Senator Jepsen, if I may make a comment, I will not get involved in a States' rights battle here. It is a problem particularly among the active duty military. Usually the divorces occur in the States to which the service member is assigned. For financial reasons it often is not practical to go back to the State of residence. So for the military member, those on active duty, this unevenness of State laws can be a problem.

Ms. DAVIS. If I may just add, Senator Jepsen, there is even one State which does not allow for either alimony or property division.

Senator JEPSEN. I thank you for your testimony. And I am reminded of a true story about a general some time, maybe back in the times you referred to in your statements, about 1899. As chauvinistic as they may have been in those days, there would have been some honor, and it reminds me of a saying that a general had when he left a meeting. The professor was asking him about what went on and he did not want to tell him. And he kept pushing him, and he said:

> Well, I will tell you. There were some things that were said there that were new and there were some things that were said there that were true. But those that were true were not necessarily new, and those that were new were not necessarily true.

And we have some of that applying here.

I appreciate your testimony, and we look forward to working with you, and we seek and invite your counsel as well as any additional information we may obtain as time goes on. I assure you, we are very

interested and we intend to do something, hopefully the right thing.

Ms. ABELL. Thank you, Senator.

Ms. LOCKE. Thank you.

Senator JEPSEN. We would now invite Capt. Henry Palau, U.S. Navy, retired, deputy director for legislative affairs for the Retired Officers Association. Welcome, and you may proceed.

STATEMENT OF CAPT. HENRY PALAU, U.S. NAVY RETIRED, DEPUTY DIRECTOR FOR LEGISLATIVE AFFAIRS, RETIRED OFFICERS ASSOCIATION

Captain PALAU. Thank you, Mr. Chairman. The Retired Officers Association had 302,500 members as of the 1st of September. Of this number, almost 10 percent are auxiliary members, that is to say widows of deceased members. We have a significant representation of women officers, but I frankly cannot tell you an exact number because no one ever thought to code our membership application to show sex.

It has been suggested to me that I would be a spokesman for the men and that there would be a representative of the women also. If this is the case, the men are getting shortchanged, because the views I will present are those of the Retired Officers Association, not of a group of male divorcees.

The long-term legislative efforts of my association have been supportive of traditional American values. We firmly believe that a strong family unit is the cornerstone of American society generally and a vital part of the fabric of the military society.

Lest there be any doubt as to the sincerity of this, let me review some of the legislative objectives we have supported over the years: Improved medical care for military personnel and their dependents, both in military facilities and under the CHAMPUS program. We urged improvement in the uniformed services health professions scholarship program and the uniformed services university of health sciences.

We have been among the leaders in seeking improvements in the survivor benefit program. Each Congress has seen fit to make some.

The expenditure of effort has certainly not been toward a self-serving goal. The military retiree derives no direct benefit. It costs 10 percent of his retired pay.

Satisfaction comes in knowing he has provided for his survivors. The Congress has now designed a program far superior to the original and it is our hope that there will be massive infusion during the new open enrollment period created in the Budget Reconciliation Act of 1981.

TRCA offered this pamphlet, "SBP Made Easy." Let me read to you what the Adjutant General of the Army had to say about this publication. SEP Made Easy is without a doubt the finest publication extant which explains the program in clear, concise, easy-to-understand language. This letter constitutes a request to reprint SEP Made Easy in an estimated quantity of 350,000 copies. Needless to say, we granted the request to reprint.

Another of our publications, "Reserve Retirement Benefits," has had 143,000 copies distributed, again without charge. It is used as a training manual at numerous Reserve training centers around the country.

More than 1 million copies of the grand-daddy of our publications, "Help Your Widow While She's Still Your Wife," have been printed and distributed totally without charge to the recipients.

Perhaps the most significant service that TROA provides its members is our supplemental health insurance program, which we called MEDIPLUS. More than 137,000 of our members are insured under MEDIPLUS with just under 300,000 total insured, counting dependents. As you are aware, CHAMPUS and medicare only pay a portion of the medical cost and the individual is responsible for the balance. To place this in perspective, MEDIPLUS premiums collected this year will be around $40 million. TROA is not in the insurance business. The program is underwritten by Hartford Accident & Indemnity Co. and is administered by Kirke-Van Arsdel, Inc., of Des Moines, Iowa. Needless to say, those companies are in the business to turn a profit, but we have learned enough about the insurance business that representatives of the Hartford or Gary Kirke of KVI will tell you we have shaved their profit margin very thin. Any excess premium collected or experience rebate has not come into TROA's coffers. It has been deposited to our widow's and dependent's health benefit trust. There are 6,000 widows of members who died before October 1 this year to whom this benefit has been extended and who will never again have to spend a penny for their supplemental health insurance.

I could continue describing programs that benefit the military family, but time does not permit and I think I have made the point.

TROA does operate exclusively on member dues. We do not skim 1 penny from any of our programs. I mention this to anticipate a question. I am inevitably questioned as to whether I am speaking for myself or my association and how do I know that the members really agree.

Mr. Chairman, I first testified in opposition to similar legislation before your counterparts in the House in May 1980. This position was published in our magazine. In November 1980 TROA joined with six other military-oriented associations in filing an *amicus curiae* brief with the Supreme Court of the United States in support of Colonel McCarty. This event was also prominently reported in our magazine.

Mr. Chairman, we have had hundreds of letters and phone calls from our members advising us that we have done the right thing and only three letters of opposition. In addition to this we have witnessed a net growth of 27,000 members from May 1980 through August 1981. I think this shows that we have the pulse of our organization.

I have not discussed the content of this statement with other organizations and I do not claim to represent them. I do, however, feel that our views are representative of theirs since we were in agreement in filing the *amicus* brief.

The Retired Officers Association strongly opposes enactment of any of the legislation being considered by your committee today. We feel that it is potentially divisive of military families who may be experiencing temporary marital difficulties and that it will be injurious to the retention of career personnel who may become involved in divorce proceedings.

I could speak for hours on the rationale of this position and provide counterbalancing stories to those you have heard from prior witnesses. I realize I have already used much of my time and I will stop when

you so indicate. You have heard the position of the Department of Defense, but I would urge you also seek the opinion of the uniformed service personnel chiefs before you take action on this legislation.

The least complicated of these bills are S. 1453, introduced by Senator DeConcini, and H.R. 1711, introduced in the House by Mr. Hance. On their face they seem quite innocuous. S. 1453, according to Senator DeConcini—

> Resolves the questions raised in the Supreme Court's recent decision in McCarty versus McCarty. In that case the Court held that Federal law preempted State disposition of property in marriage dissolution proceedings involving the right of an ex-spouse to retirement benefits of a former member of the armed services.

That was the Senator's statement of the law of McCarty, and I fail to see anything complicated or involved about that. McCarty does take the hit-or-miss element of chance resulting from accidents of geography out of divorce decrees.

In the past, these aberrations were due to the application of the differing laws of some 53 separate jurisdictions. In one of these, Texas, a community property State, a former spouse is not entitled to alimony. If a former spouse doesn't get a property distribution then he or she will not receive continuing support unless it is the result of an arrangement entered into voluntarily by the parties.

Texas treats a serviceperson who has not yet completed 20 years of service as not having a vested property interest subject to distribution. Texas sometimes makes a pro rata distribution of retired pay based only on those years that the couple lived in a community property State.

The California courts treat military retired pay differently. They make a pro rata distribution based on the number of years of marriage during creditable military service, regardless of where it was performed and regardless of whether the parties ever resided in a community property jurisdiction prior to the institution of divorce proceedings. This goes to the ex-spouse of the military member as his or her individual property and then the court addresses itself to spousal and child support. In the celebrated *McCarty* case, Mrs. McCarty was awarded 45 percent of the retirement plus alimony in the amount of $500 a month. Incidentally, Colonel McCarty was awarded custody of the three minor children.

Two recent California decisions carried this still further. A California divorce decree allowed a former husband to determine when he might retire from the Air Force. The ex-spouse contended that she should have the right to determine when she would begin to collect her property interest in the husband's retired pay and that it should not matter whether the husband chose to retire from the military. The California court agreed and held that—

> The non-employee spouse is the one who has a choice as to when his or her share of the pension (i.e., Air Force retired pay) shall begin. This election can be made at any time after the pension is matured by motion in the trial court by the non-employee spouse.

The California courts advanced this one more step in *Billmore* v. *Billmore* where the court held that a husband who refuses to retire must pay damages to the ex-spouse in an amount equal to what she would have received as her property had he retired.

Idaho has added one further refinement. The Idaho court sees no need for the former spouse to wait and receive a share each month as it is paid to the retiree. The Idaho court consults the actuarial tables and determines what the gross amount of the former spouse's annuity will be if the retiree lives a normal life expectancy. This figure is then included in a lump sum property distribution.

Montana added still another variation. The Montana decree provided that the wife's share in the retired pay should be paid monthly as it was received by the husband. Furthermore, it provided that in the event the wife predeceased her husband, that the pension should pass to her estate.

The *McCarty* decision has been much maligned in the press. It was captioned in the media as the second antifeminist Supreme Court decision in 2 days * * *. The *McCarty* decision has been described with intense emotion as depriving military wives of all their rights and protection. This is simply not true. Let me quote one short portion of the majority opinion:

> We recognize that the plight of an ex-spouse of a retired service member is often a serious one. * * * That plight may be mitigated to some extent by the ex-spouse's right to claim social security benefits * * * and to garnish military retired pay for the purposes of support.

Numerous problems arise.

If a service member is divorced as a junior enlisted person or officer with relatively few years of service and continues on for a full career to retire as an E–9 or flag or general officer, what pay should the divorced spouse receive a pro rata share of? Should it be at the pay grade at time of divorce or at the time of retirement? The courts, prior to *McCarty*, provided a share of final retired pay. This seems inequitable.

Another real life example. An Army lieutenant colonel returned from Korea a psychiatric wreck. Although he was rehabilitated and given a disability retirement, he still had severe mental problems. His wife determined that she could not tolerate this situation and obtained a divorce. He married again and his second wife has nursed him through relapses and periods of severe depression. Is the first wife really entitled to a pro rata share of his retirement? Which wife should receive a survivor benefit annuity in the event of his death? The first who shared his entire military career or the second who nursed him back to health and remained with him in his time of need.

There is no doubt that the faithful wife who remains at home and raises a family has performed a great service. But she is not the only party to suffer the pain of separation. It is not easy to be half way around the world and receive notification that a child has a severe injury or serious illness and be powerless to do anything about it. Perhaps not even to be able to acknowledge receipt of the notification. This happens regularly in the case of a fleet ballistic missile submariner while on patrol.

Assuming that you should decide that retired pay should be subject to distribution as property, to how much of it should a former spouse be entitled? H.R. 1711 provides that it may be paid in whole or in part to another person. This could very easily result if the State courts are permitted to distribute the pay as they see fit.

The Senate is about to enter a conference with the House to determine whether the active duty pay raise should be 14.3 percent across

the board or whether it should be targeted to retain, in particular, certain senior enlisted personnel. The courts of California have already interpreted the law to frustrate the intentions of the Senate. They have determined that once the retirement becomes payable it is the former spouse who has the right to determine when he or she is entitled to receive retirement benefits. If the service person remains on active duty, the former spouse may receive as damages the amount that would have been paid if retirement had occurred. In addition to the anomaly of a former spouse receiving as property, not alimony or child support, a portion of the service member's active duty pay, think of the administrative nightmare that would be thrust upon the services in recalculating each year or each month what that spouse's pro-rata share of the retirement would have been had the service person retired.

What is the likelihood of a service member continuing to serve under these circumstances? Or, the bigger question, what will be the effect on our national defense?

The Foreign Service is already operating under a scheme similar to that suggested under S. 888. Why shouldn't the Armed Forces? There are many differences. The entire Foreign Service does not comprise enough personnel to man two Army divisions. Administrative problems are miniscule compared to the military. The Foreign Service is not under the social security system. The military is, however, and a former spouse is entitled to benefits based on the military member's contribution.

The civil service operates under a law similar to H.R. 1711; why not the military? Again, the first response is social security. The former spouses of military persons derive social security benefits from this service. There is no comparable benefit available in the civil service. From its inception the military nondisability retirement system has been as much a personnel management tool as an income maintenance method. The system was and is designed not only to provide for retirees but to insure a young and vigorous military force, to create an orderly pattern of promotion, and to serve as a recruiting and reenlistment inducement.

Military retired pay differs in significant aspects from a typical pension or retirement plan. The retired officer remains a member of the service and subject to the Uniform Code of Military Justice. He may forfeit all or part of his retired pay if he engages in certain activities. Examples are the Dual Compensation Act of 1964, which applied only to retired regular officers but which was extended and modified by the Civil Service Reform Act of 1978 to cover all retired military personnel—officer and enlisted, regular and reserve. Title 18 United States Code, section 281 is a criminal prohibition against a retired regular officer selling anything to the Government through the department in which he holds a retired status for the remainder of his life. Title 37 United States Code, section 801(c) precludes all retired regular offices from selling supplies or war materials to any of the uniformed services for 3 years following their retirement. Article I, section 9, clause 8 of the Constitution prohibits employment of all retired military personnel by a foreign government unless congressional consent is first granted.

As recently as December 1980, in the Defense Officer Personnel Modernization Act, (Public Law 96–513) the Congress provided that

the retired officer remains subject to recall to active duty by the Secretary of his department at any time. All of these factors have led the Supreme Court to conclude that military retired pay is reduced compensation for reduced current services.

There are other differences. The Civil Service Reform Act of 1978 provides that "labor organizations and collective bargaining in the civil service are in the public interest." By stark contrast less than 1 month later the same Congress found it to be necessary in the public interest to make it unlawful for a member of the Armed Forces to join or maintain membership in a military labor organization. This is as it should be, but the responsibility of those who control the destiny of the military member under these circumstances is heavier.

If the civil servant is derelict in the performance of his duty, refuses an order or is insubordinate he is subject to disciplinary action which at worst could amount to severance. If, however, his pension is vested, it won't be taken away. The military member under similar circumstances is subject to court-martial, which can and frequently does lead to imprisonment and loss of all benefits.

Those who argue that military retired pay should be subject to the disparate treatment of the several States ignore two essential characteristics of military service. Military forces are international in operation and their members, unlike civilian employees, are not free to choose their place of residence. The value of retired pay as an inducement for enlistment or reenlistment is diminished to the extent that a service member recognizes that he or she may be involuntarily transferred to a State that will divide that pay upon divorce.

S. 888, H.R. 3039, and H.R. 3117 take all of the above one step further. They provide for a pro rata distribution of military retired pay to a former spouse unless a State court orders differently. They do not, however, provide a cap or maximum distribution except to provide that a court order may not provide an annuity or combination of annuities which exceeds the amount of the member's retired pay.

I have attempted to analyze those portions of the bills, these last three, which relate to the survivor benefit plan as regards the entitlement of a former spouse to an annuity. The bills are confusing and leave many questions relating to the integration of dependency and indemnity compensation paid by the Veterans' Administration and social security payments unanswered.

They will create numerous legal questions in the administration of State inheritance, estate, and income tax laws. No provision is made for the forfeitures required by the Dual Compensation Act. In short, legislation that was authored with high principles dealing with the equality of women seems to create more issues than it resolves.

In final summation, this committee is being asked to provide a special remedy to the former spouses of military personnel in situations where the traditional family relationship has broken down. Admittedly there are many women who are having difficulty in collecting support that is properly owing to them. Today their numbers seem quite large.

By way of comparison, let me point out that during my military career as a Navy judge advocate I participated personally, in some manner, in the prosecution or defense of hundreds of sailors for unauthorized absence or desertion. Their offense was prompted most

often not by a refusal to serve their country but by seemingly intolerable family circumstances involving either unfaithful wives or neglected children.

But both of these groups, spouses and servicemen, represent a very small segment of the military society. Rather than concentrating on special solutions for these situations, our attention should be devoted to improving the family unit by providing sufficient compensation and facilities to permit those families to lead a normal healthy life.

A former spouse has the right to be adequately supported. Military retired pay should be included in determining an appropriate level of support. There are adequate laws in existence to provide alimony and child support with provisions for garnishment of Federal pay when the service person fails to comply. Further Federal legislation is neither necessary nor desirable at this time. These bills should be reported unfavorably.

I thank you again for providing this opportunity to appear before you, and I will be happy to answer any questions you might have.

Senator JEPSEN. Mr. Palau, you conclude your written statement by claiming there are adequate laws in existence to provide alimony and child support with provisions for garnishment of Federal pay when the service person fails to comply.

Given the wide disparity in State garnishment laws and the testimony that has been received here this morning, do you think garnishment is a satisfactory tool to enforce these court orders?

Mr. PALAU. I know garnishment varies from State to State. In some States it is extremely satisfactory; in other States, from what I have heard today, I would say it is totally unsatisfactory. There are other laws besides garnishment, as a matter of fact, on the books. There is a uniform act on enforcement of judgments. I have, frankly, not looked into that, so I am not prepared to go into the details of that.

But again garnishment is a matter of State law. As in the case of Texas, with no alimony, I really believe that it is Texas that should be changing its law to protect women who are divorced in Texas and given alimony. And it is up to the States to haul their garnishment laws into the 20th century, as late as it may be.

Senator JEPSEN. How could the enactment of any of the proposed legislation create divisions between a married couple?

Mr. PALAU. When a couple is at that point in time where perhaps it comes time for a transfer and the woman has a job and she can look at this and say, Well, OK, I have been married for 10 years. Let him go. I can stay right here and keep my job and so on and so forth.

She has her vested rights and, as a matter of fact, she has a vested interest in his employment, if he retains it, at 10 years, and he doesn't get such a right until he's been there 20 years.

Senator JEPSEN. How would the legislation affect the security or retention again? You touched on it here.

Mr. PALAU. As I mentioned, specifically, I suppose, to take the extreme case, that California decision. You have tailored or targeted the pay bill to have a 22-percent increase for the E–7's, E–8's, and E–9's over 20. What effect do you think it is going to have on those people if the former wife comes in and says, hey, I want my share of what would be my retired pay today? You are giving him 22 percent

and having her take it away. It will not likely serve as a retention device.

Senator JEPSEN. That is hypothetical. You are opposing that.

Mr. PALAU. That's an actual case in California.

Senator JEPSEN. Do you have evidence to support your position on that?

Mr. PALAU. Yes. I skipped the citation as I was reading it, but it is an actual California case that I cited to you. It is *Gilmore* v. *Gilmore*, reported in 169 California Reporter 811. And the case that started it is In Re Marriage of Luciano. That had to do with an Air Force officer, 164 California Reporter 193.

Senator JEPSEN. And, finally, you indicated that there were some special—not special, but that consideration be given to the fact that some of the retirees, if I understood you correctly, are subject to recall or possibly even court-martials.

Do you know anyone who has been recalled or court-martialed who is retired?

Mr. PALAU. The lead case on court-martial is *U.S.* v. *Hooper*, a rear admiral who was recalled and court-martialed. And that has gone to the Supreme Court and has been upheld as being constitutional.

I do not personally know of anyone who has been involuntarily recalled, although I know of many officers who have been approached by their Department and asked to return, and they have returned voluntarily. I believe that during Vietnam, although I cannot swear to this, many members of the Fleet Reserve were called to man ships during the Vietnam era.

Senator JEPSEN. Is there anything else that you have?

Mr. PALAU. No, sir. I thank you again for the opportunity.

Senator JEPSEN. I thank you for your testimony.

I have received a number of statements from associates with concerns about the *McCarty* decision and the various legislative proposals.

I regret that time precludes us from having all interested parties speak. However, their statements will be made a permanent part of the record.

[The prepared statements follow:]

PREPARED STATEMENT OF JOHN P. SHEFFEY, EXECUTIVE VICE PRESIDENT, NATIONAL ASSOCIATION FOR UNIFORMED SERVICES

Mr. Chairman, Gentlemen. I am John P. Sheffey, Executive Vice President of the National Association for Uniformed Services (NAUS). Our association's membership is drawn from all the seven uniformed services of the United States; active duty, retired, reserves, veterans, and their spouses or survivors. Our mission is to uphold the security of the United States by supporting activities that preserve and improve the attractiveness of service careers and sustain the morale of the uniformed services. We work on the "people things" such as pay, retirement, survivor benefits, and the traditional entitlements that make a service career a way of life rather than just a job.

NAUS, which has female as well as male members—active duty, retired, wives, and widows—opposes S. 1453 which would reestablish the concept of military retired pay as community property that existed prior to the Supreme Court's decision in the McCarty vs. McCarty case on June 26, 1981. Prior to that date, the eight community property states and some nine others, I believe, allowed their divorce courts to treat service members' equity in retired pay as community property to be divided without regard to the circumstances of the divorce. The Supreme Court's decision reconfirmed several previous Court decisions that uniformed services retired pay is pay, not a pension or property. The reasons for

this finding are spelled out in great detail in the court's opinion in the McCarty Case, No. 80–5. This is the law of the land and can be changed only by an act of Congress that redefines the right to service retired pay as a property interest. It does not appear to me that the language of S. 1453 treats this question. If approved by the Congress as drafted, it may invite another Court test to determine if it actually does overturn the McCarty decision. In addition, S. 1453 refers only to the Armed Forces rather than all the seven uniformed services which have essentially identical pay and retirement laws.

There are many reasons for NAUS' opposition to S. 1453 .The most important are:

1. We believe that it is fundamentally wrong to establish a direct channel of responsibility from the armed services to a divorced spouse. The wife of a service member does not work for his service—she works for him. Married and unmarried service members receive the same pay. In no way can it be established that a spouse earned a financial obligation from the service. Service wives, like all other wives, accompany and make homes for their husbands and children, often under difficult circumstances. But they do not participate in earning their husbands pay and benefits and share the physical hardships and dangers of his career. They do not share the mud and cold of field operations, the confinement in ships at sea or the dangers of flight. They do not share in the loss of life and limb in battle or in training exercises. They do acquire a tremendous obligation from their husbands for their services, but that obligation is from the service member, not from the government. Establishment of any other concept would open a Pandora's Box. Why not then apply the concept to active duty pay, and give half directly to a spouse? If a member's right to retired pay must be automatically shared with a divorced spouse, why not his right to PX's, Commissaries, medical care, space available travel, burial in a government cemetery, and every other reward for service?

2. To the best of my knowledge, only 17 states currently treat pensions and retirement pay as property subject to division by divorce courts. The service member has little choice in where he is assigned for duty. Unlike the private citizen, he can be exposed to community property division of his retired pay by being ordered to such states regardless of his personal wishes. So great a difference in treatment of his retired pay, in comparison with other service members divorced in other states, cannot be justified.

3. Prior to the McCarty decision, spouses could choose a state with favorable laws and divorce a service member who was overseas or in a distant state and unable to fight the divorce effectively because of inability to pay lawyers or even be present for court proceedings. The following example of many such letters from NAUS members illustrates this problem:

"I very much appreciate your sending me a copy of NAUS' testimony on HR 2817, HR 3677 and HR 6270.

"We are in complete agreement on HR 2817. We have some common ground on HR 3677 and HR 6270. I am still puzzled by Colonel Sheffey's reference to alimony and child support. Public Law 93–647 passed in Jan. 1975 already allows garnishment of federal law for those two limited purposes. HR 3677, HR 6270 (and S. 846) would allow garnishment only in a property settlement and would apply only in the eight community property states. My experience and observation convinces me that if these bills pass, they would be very harmful to the armed services. Many Army and all Air Force personnel train in Texas. Since it's also a "no fault" divorce state, these bills would make San Antonio, Texas the divorce center of the world for the Army and Air Force. A spouse of military personnel could go there to file for divorce. Her misconduct could not be discussed and the retirement pay is routinely divided as community property (half and half).

This is what happened even when I lived in Illinois. My wife's attorney stalled and avoided my jurisdiction hearing until she completed resident requirements. I was cleaned out and was finally unable to obtain military leave for the court date. My attorney pleaded the Soldier and Sailor Civil Relief Act of 1942 and the judge disallowed it and proceeded while making anti-military remarks. This action was successfully appealed to the Texas Supreme Court. After 3 years it was reversed and remanded to the same court. It was more onerous the second time around. After five years of agony, I was broke and my home in Illinois was sold at auction. This was applied against $50,000.00 for my wife and $25,000.00 for her attorney in judgments (this money never existed). The property judgments were the means the judge intended to enforce

payment of half my retirement pay for life as "community property." Five years and between $50–$60,000 legal costs have filled my retirement years. I sometimes forget other people cannot have any intense interest unless they have been there. The basis of my divorce was an adulterous affair my wife entered into with an AF Colonel while I was in Vietnam. "My experience revealed two other serious problems for service personnel. Jurisdiction for the service member is the first. The spouse can go anywhere and file for divorce. When it's 1200–1500 miles from the military base of assignment, there is no way the service member can get enough military leave (and afford the travel) to adequately defend his rights and property. The other concerns Public Law 93–647. This law should be amended to allow alimony only where child support is involved. The sharp divorce lawyers in distant courts use it to clean out service personnel all the time. The service member then must get out of the service as soon as possible or retire early to reduce the bite. Everyone loses except the divorce attorneys.

"In summary, I believe two Congressional actions are necessary after defeating all these bills. They are:

1. Amend Title 10 United States Code to make retirement pay separate pay that may not be divided as community property. This would be similar to railroad retirement pay in 45 USC 231d, 231m as upheld by the U.S. Supreme Court. (Note—this was written before they McCarty decision).

2. Amend PL 93–647 to exclude ailmony without child support or limit it to a reasonable period of transition for the divorced spouse.

"Although I remain puzzled over any support of HR 6270, HR 3677 and S. 846 (all are identical), your providing me your testimony is greatly appreciated." (Name deleted).

Further objections to S. 1453:

4. S. 1453 would provide divorced spouses of service retirees rights not even given wives never divorced. No law requires a service member to give his wife half his retired pay.

5. S. 1453 ignores the varied individual circumstances of the two parties in a divorce. A wealthy spouse of an improverished service retiree would be entitled to half the member's retired pay, regardless of relative need. The property concept would mean that payments of half the service member's retired pay would continue to heirs after the death of his divorced spouse while he and his second wife are impoverished in their old age.

6. S. 1453 would encourage discontented spouses to abandon their marriages to service members as retirement approaches. The economic incentive to make a go of the marriage would be ended. Note also that remarriage would not terminate this property right, and leave the service member paying up to half his retired pay to a former spouse who has a new husband.

7. A service member has no right to retired pay prior to 20 years' service. Nevertheless, before the McCarty decision, some state divorce courts regularly awarded divorced spouses a share of this non-existent right that would not become a right until long after the divorce—provided the member stayed in the service.

8. S. 1453 ignores the harm done to second wives and the children of a second marriage to a service member. A divorced first wife with no children and a new husband could get up to half a retired service member's retired pay while he and his second wife and children would be deprived of this badly needed income. At current divorce rates, at least half of service member's spouses will be of second marriages. Therefore, the interests of second wives are fully as important numerically as the interests of divorced first wives.

9. Service members, male and female, overwhelmingly oppose the S. 1453 concept. This concept is being sought not by the individuals who are serving their country in uniform throughout the world, but by their ex spouses. Many of them have chosen to leave their marriages; most have at least contributed in some measure to the marriage failures, and some have been unjustly discarded. The women's organizations supporting S. 1452 consistently imply that all divorced service spouses are in the last category, discarded in their old age—helpless and unemployable. The fact is that the average age of women at the time of divorce is under 29, and the vast majority are under 35. Most have 20 to 25 years of working life ahead of them. While alimony until remarriage and child support are justified for most, there is no justice in making them a lifetime burden on their former spouses. There are, of course, exceptions which should be determined on an individual basis by state divorce courts.

10. When both spouses are service members, S. 1453 could have the outrageous effect of giving half the retired pay of the older retired spouse to a younger former spouse still on active duty at full pay.

11. The Armed Services already have great difficulty attracting and retaining the quality and numbers of people they need. S. 1453 would create another disincentive for military careers and create an additional inducement for members to leave the services.

In summary, S. 1453 would affect service members unequally, hurting only those caught by the few states that treat retired pay as community property, and it would have harmful and unfair impacts that far exceed the injustices at which it is aimed. The National Association for Uniformed Services urges this Committee to disapprove the bill.

S. 888

S. 888 includes many provisions in addition to those concerning a divorced spouse's right to share in their former uniformed service member spouse's retired pay and survivor benefits (SBP). NAUS will comment only on the service retired pay and SBP provisions.

The provisions for division of service retired pay and survivor benefits in S. 888 are taken practically verbatim from Rep. Patricia Schroeder's H.R. 3039. This is basically the same bill as her H.R. 2817 in the 96th Congress. NAUS and many other major associations of active and retired service personnel successfully opposed this bill in the House during the 96th Congress, as did the Dept. of Defense. It was never reported out of Committee.

One change from H.R. 2817 in S. 888 is to make the automatic vesting of divorced spouses in service members' retired pay and survivor benefits subject to denial by specific orders of state divorce courts. While this is a gesture toward fairness, it still leaves the service member the enormous burden of proving that these rights should be denied. He remains automatically "guilty" unless he can prove himself innocent—a clear violation of his fundamental legal rights. The members of this Committee are surely aware of the great difficulty of obtaining to denial by specific orders of state divorce courts. While this is a gesture toward should establish a neutral base that requires positive action by the courts to award any part of a service member's income to a divorced spouse. For those few states that do not have alimony, a more appropriate relief would be a change in state law instead of providing a blanket federal solution with all its accompanying problems and inequities.

NAUS opposes the service retired pay and survivor benefit provisions of S. 888 for the same reasons listed above for our opposition to S. 1453, except that the inheritance of retired pay by heirs of the divorced spouse is not authorized by S. 888.

The following are major additional objections to S. 888, or variations of the objections to S. 1453 caused by the differences between vesting rights (S. 888) and community property rights (S. 1453):

1. The legislation extends federal authority into a legislative area that has thus far been reserved to the states. It would create a major federal intrusion into state and private rights.

2. The legislation ignores the infinite variety of circumstances that normally affect divorce settlements. The spouse could have been a hindrance to the member's career, as some spouses are, but it would make no difference. The marriage could have endured ten years or more, only to provide a home for very young children of a service man who had no other recourse when overseas, but it would make no difference. The spouse could be wealthy or have a higher earned income than the retired service member, but it would make no difference. The spouse could have terminated the marriage against the wishes of the service member, but it would make no difference. Regardless of the countless different circumstances that create broken marriages, the spouse would always be entitled to a share of the member's annuity and survivor benefits unless the divorce court took positive action to deny such rights.

3. The S. 888 provisions would increase the jurisdiction shopping by wives desiring to divorce service members even more than would S. 1453. The wife could choose a favorable no-fault divorce state such as Texas or California, divorce the service member against his wishes and still collect half his retired pay and survivor benefits. A wife could refuse to accompany her service husband

on an undesirable assignment, divorce him and still take part of his retired pay and survivor benefits.

4. Vesting divorced spouses in their former spouses' retirement and survivor rights after only 10 years of marriage is unreasonable. The typical divorced woman of a 10-year marriage would be only 30 to 35 years old with 25 to 30 years of working life ahead in which to provide for her own old age. The second wife and her children would be deprived of adequate income when the husband retires or dies.

5. An award of retired pay and survivor benefit rights to a divorced spouse of a service member with less than 20 years' service would be dividing up a property right that does not exist. Until he actually qualifies for retirement by 20 years' service, the service member has no vested equity in retirement.

6. The S. 888 provisions for remarriage after age 60 without loss of the first husband's retired pay and survivor benefits would result in a retiree having to support a former wife with a husband of her own and his widow having to share her survivor benefits with a former wife who has a living husband. The second wife and family could be impoverished for the benefit of a first wife who has remarried and has no real need for the S. 888 benefit.

7. Under S. 888, a service member who was married to one wife for all 20 years of his service only to have her leave him after retirement could leave no survivor benefit for his second wife, although she could be married to him for 40 years or more. The first wife would get it all.

8. Service wives of 10-year marriages already have social security rights on their husbands' service. They are not without some vested protection.

9. A remarried retired service member whose former spouse left him to marry someone else would not be economically secure. The overhanging threat of termination of the divorced spouse's second marriage and restoration of her right to share in his survivor benefits would make estate planning a shambles for the retired service member.

10. The uniformed services now have 2,000,000 members, including more than 150,000 female members. NAUS has been unable to find a single service member, male or female, who wants automatic sharing of his or her retired pay with a divorced spouse. The S. 888 provisions are being sought by divorced wives and wives who are concerned that they may someday be divorced—not by service members. The government's obligation is to the member, not to the divorced wife. Unless this principle is observed, the government will have embarked upon an open-ended obligation for all forms of support of divorced wives fully as good as for those who remain married. For example, continued military medical support for divorced wives is one of their legislative objectives.

11. S. 888 assumes that the divorced spouse has earned a government-guaranteed compensation for her participation in support of the service's interests. This is a wholly unsubstantiated concept. As pointed out above married and unmarried service members earn the same pay. The married members, not the services, have responsibilities to their divorced wives. Consider for example, the wife of a 10-year or longer marriage who divorces her service member husband. He subsequently leaves the service without qualifying for retired pay or survivor benefits. She gets nothing directly from the government for her alleged services to the government as a service wife. Under S. 888, a wife who had been married to a service member exactly the same number of years when divorced, but whose husband qualified for retirement would automatically acquire a substantial interest in his retirement and survivor benefits unless denied by the courts. Both wives performed exactly the same duties for the same number of years for service-member husbands. Both were divorced after the same numbers of years of marriage; but, under S. 888, one would have acquired a lifetime compensation from the government, the other nothing. The S. 888 concept simply cannot be made equitable. Divorce settlements must be made on an individual basis by the courts to retain any measure of fairness to the service member.

12. The S. 888 provisions for sharing retired pay will create a powerful incentive to many divorced spouses of service members not to marry again. With no great social stigma today for living together without marrying, more than one and one-half million couples are doing it. There are significant tax advantages where both parties have income, only partially relieved by the new tax bill. Retention of the retired pay and survivor benefit shares authorized by S. 888 would be a great additional benefit if the divorced spouse chooses the unmarried cohabitation arrangement. Thus, the second wife of the service member is

deprived of needed income in her married or widowed state while the divorced wife continues to get it while living with another man outside marriage.

13. The proponents of S. 888 draw a bleak picture of the lives of service wives, stressing the hardships, family separations, and frequent moves. They maintain that service wives have little opportunity to establish careers of their own. This is not substantiated by the facts. Approximately half the wives of active duty service members are working right now. The younger ones do indeed have to work at temporary employment that provides little or no equity in retirement. However, with very few exceptions, enlisted service members retire before their wives are 40 and officers only two or three years later. Many serve their last tour of duty near where they are going to retire, so the vast majority of service wives do not have to move after they are 40 years of age. This easily leaves them more than 20 years of working life. Most divorced service wives are not thrust into the cold cruel world in their old age. The great majority are under 40 and completely capable of supporting themselves and providing for their old age. Of course those with young children deserve temporary alimony and child support, and those who are truly incapable of taking care of themselves deserve life-long alimony. Legislation is needed to guarantee such payments by service members, and NAUS will support it when it is introduced.

S. 888 has many other deficiencies of omission. No legislation in such a complicated matter could avoid unforeseen problems and unanswered questions. S. 888 invites these questions, among others:

1. Who pays taxes on retired pay on pensions divided with divorced spouses? Is the shared portion given the same tax treatment as alimony?

2. What happens to divorced spouse's share when military retired pay is reduced under the dual compensation act or the federal pay ceiling limitation? Some retirees in high-level civilian positions in government must sacrifice their entire retired pay. All regular officers sacrifice some portion.

3. What happens when military retiree waives military retired pay for a combined civil service annuity when his divorced spouse was married to him only during his military service?

4. S. 888 gives some divorced spouses survivor benefits even when member did not take out an SBP. The SBP is a contributary plan. Who pays the cost of this free ride?

5. The SBP allows the individual to take out any portion for his survivor from $165/month to 55 percent of his retired pay. The proposed bill appears to allow no choice other than 55 percent. This is a gross intervention into his personal freedom.

6. The ERISA section of S. 888 appears to require a court order to allocate private business pension and survivor rights to divorced spouse. The military and civil service section require a court order to prevent allocation to divorced spouses. This is a very significant discrimination against federal employees and service members. Why?

Our society has changed drastically from earlier days when divorced spouses were nearly always at great economic disadvantage. Nearly one marriage in two ends in divorce. Divorced spouses of uniformed services retirees are already entitled to social security when the marriage endured 10 years or more. The great majority are quite young. In today's world most of the women who would benefit by the proposed law can readily provide for their own security in old age. Lives change so much and so rapidly after divorce that there can be no overall justice in a proposal that would drastically harm the lives of second wives and children 20 to 30 years after the divorce from the first wife.

S. 888 and S. 1453 have been proposed because there are some older service wives, divorced late in life, who do face hardships and are not capable of taking care of themselves. But these are a tiny proportion of the thousands of younger divorced spouses who have no real long-term need for support from their former husbands. To help a handful, the proposed law would do great injustice to thousands of service members, their second wives, and their children. There are already alternatives available for the handful that may not have been treated fairly. All today are entitled to social security from their husband's military service. When justified, the courts can order property divisions and alimony payments that permit the divorced wife to provide for her own security through insurance annuities. It is not unusual for divorce settlements to require the husband to carry life insurance payable to the divorced wife.

S. 888 is unfair in concept and badly drafted even were the concept a reasonable one. It is a time bomb with unpredictable impacts that won't be known

for many years. It will discourage marriage among service people and encourage divorce prior to 10 years' service for the service member and after 10 years service for the spouse. It will discourage enlistment and reenlistment in a career that already requires enormous sacrifice of personal freedom. In short, both S. 888 and S. 1453 serve only the interests of wives in failed marriages and violate the interests of the service member. This is a strange objective in a situation where career service incentives are already failing to attract the people we need.

There is a need for a simplified method of enforcemnt of alimony and child support orders on retired service members. NAUS would have no objection to legislation that would require direct payment by the services of such court-ordered obligations, provided it did not include division of retired pay as community property.

There are two million uniformed services members who could be affected by the bills before you today. I doubt that one in ten thousand of them want these bills passed in their present form. These dedicated people are scattered all over the world and few are even aware of the proposed imposition on their private financial rights. They are not organized to make themselves heard in Washington. There is the further constraint that a happily married service member cannot openly express opposition to these unfair proposals without damaging relations with his spouse. This also applies to married female service members who are equally opposed to S. 888, S. 1453 and other similar proposals. These people are practically helpless politically, psychologically, and geographically in making their opposition known to the Congress. They can only trust their leaders in the Pentagon and you members of the Congressional Committees involved to protect their interests. I beg of you not to betray that trust.

PREPARED STATEMENT OF DONALD L. HARLOW, EXECUTIVE DIRECTOR OF THE AIR FORCE SERGEANTS ASSOCIATION

Mr. Chairman, distinguished members of the subcommittee; I am Donald L. Harlow, Executive Director of the Air Force Sergeants Association (AFSA) and the primary spokesman on legislative matters for its 157,000 members and their dependents. I thank you for the opportunity of expressing our position on the controversial issue of division of military retired pay as property in divorce settlements.

Over the past two years, we have published articles in our magazine Sergeants and in our one page AFSA Lobby Ledger. Both of these publications are distributed to all members of the U.S. Congress, officials in the White House and in the Department of Defense. We have also testified on the bills introduced in the House in 1980 by Rep. Patricia Schroeder of Colorado and Rep. Joseph L. Fisher of Virginia.

Specifically, our position has been one to strongly oppose any legislation that would arbitrarily provide a pro-rata share of an individual's retired/retainer pay to an ex-spouse in a divorce or separation action. Any such law impinges upon the authority and responsibility of the Judicial Branch of our democratic form of government, as spelled out in the constitution. The courts of the land are charged with the responsibility of adjudicating disputes between two parties, married or otherwise. Therefore, no public law should usurp that authority.

There are already too many laws that infringe upon the private lives of American citizens. If there is a disagreement between husband and wife, no matter how long they have been married, and such disagreement cannot be mutually resolved between the two parties, then a court of law must weigh all factors in the dispute before rendering a decision.

While there are some pathetic cases involving divorce on both the military members side and that of the ex-spouse, it is inconceivable how a public law can resolve all of the intricacies involved in the dissolution of a marriage that was voluntarily entered into and existed for a period of time.

Statements have been made to the effect that the spouse of a military member is entitled to a portion of his or her retired pay. This is an erroneous assumption and should not be a basis upon which any public law is framed. In most instances, the spouse accepted the lifestyle of the military, otherwise the marriage would never have been consummated or would have ended during the early stages. As to the entitlement aspect, is the spouse of a truck driver who is on the road

80 percent of the time each year also entitled to a portion of his or her retired pay? What about the salesperson whose territory demands his absence from home and family 75 to 80 percent of the time each year? Is his or her retired pay also subject to division in a divorce or separation action?

The recent decision rendered by the U.S. Supreme Court in the *McCarty* v. *McCarty* case held that under federal law, military retired pay is a personal entitlement of the retiree and hence not subject to division under state community property laws.

In explaining the rationale of its decision, the court pointed out that the application of community property principles to military retired pay would threaten grave harm to "clear and substantial" federal interests in that division of retired pay thereunder would frustrate the Congressional objective of ensuring ultimate financial security of the individual who commits himself or herself to a career of military service and would interfere with the Congressional goals of providing inducement for enlistments and re-enlistments as well as encouraging early retirement to achieve a youthful military force.

The Supreme Court decision did not, however, interfere with a State Court's right to consider retired pay as income for the purpose of awarding alimony or child support.

It is obvious those bills introduced in both the House and the Senate is to provide an income level for an ex-spouse of a military member. It must be noted there is an entitlement to federal benefits ,under the Social Security program. This benefit does not exist for federal employees, as they do not participate in the Social Security program.

Undoubtedly, there is concern of the ex-spouse of the military member of the loss of benefits available during active duty service of the individual as well as during his or her retirement years. Medical benefits appear to be the greatest concern of the ex-spouse, while commissary and exchange privileges may also be important considerations.

To put the problem in proper perspective, it is the responsibility of the military member to care for his or her spouse and/or children during their years of marriage. There is nothing unique or different about that as it is applicable to all individuals no matter what career they may pursue, military or civilian. When divorce or separation becomes apparent, the circumstances of the spouse and family must then be taken into consideration by the court to the extent of any further responsibility of the individual. While total income of the individual is taken into consideration prior to granting alimony and/or child support, there is not now and never should be, any law that specifically dictates to the State Courts that a pro-rata share of the individual's retirement pay must be awarded to the ex-spouse.

In Rep. Patricia Schroeder's statement of September 22, 1981, she said, "I would like to make it perfectly clear that my bill does not give automatic benefits to divorced military spouses. H.R. 3039 maintains the traditional role of the state court in future military divorce cases. What the bill does is establish a presumption of entitlement to a pro-rata share of the retired pay and survivor benefits. However, the bill clearly gives the state divorce court the authority to affirm, modify or reject the prorata formula in the bill. This enables the court to review each case on its own merits, but assures that everyone involved—the spouses, their attorneys, and the court—look at the value of the pension in the divorce settlement."

As previously stated, the State Courts do take into consideration the total income of the individual prior to granting alimony to the ex-spouse and/or children, therefore, we see no need for a public law that would establish a presumption of entitlement to a pro-rata share of retired pay and survivor benefits. This, in effect, would not preclude community property states from considering retired/retainer pay as property in divorce cases.

As for a share of the individual's survivor benefits, if the individual participates in the Survivor Benefits Program, and would desire to assign such benefits over to an ex-spouse, the current law on SBP should be changed accordingly. On the other hand, if the individual does not participate in SBP, other considerations must then be given by the court, depending upon the circumstances of both the individual and the spouse.

There are many instances where the ex-spouse has an income of her own, and is also gainfully employed. In such instances, it would be unusual for the court to grant alimony to the ex-spouse unless other circumstances would so dictate. The many variables involved in divorce or separation actions cannot and should not be overcome by a public law dictating to the individual State Courts.

In closing, I repeat a portion of my previous testimony. While we may all agree that life is becoming more complex everyday, the basic structure of our constitution must be preserved if we are to remain a free and democratic society.

The wisdom of those who framed our constitution established three branches of government—the Executive—Legislative—and Judicial. Each branch is charged with specific responsibilities and possesses the necessary authority to carry out those responsibilities. As long as we, the citizens of the United States of America, continue to resolve our problems within the framework of the constitution, America will remain a free and open society. Once we depart from this basic document, precedents will be established that will further complicate our lives.

We do not need for any federal intervention into what has been, to date, the exclusive jurisdictional authority of the individual states with respect to domestic matters. While some states differ in their divorce laws, the sovereignty of each state must be preserved.

Again, we thank you for providing our association the opportunity to express our views on the issue and I now stand ready to respond to any questions you or your distinguished colleagues may wish to pose.

PREPARED STATEMENT OF C. A. (MACK) MCKINNEY, SERGEANT MAJOR USMC RETIRED, SENIOR VICE PRESIDENT FOR GOVERNMENT AFFAIRS, THE NON-COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES OF AMERICA

Mr. Chairman: As a spokesman for the Non-Commissioned Officers Association of the USA (NCOA) I extend appreciation for the opportunity to comment on the legislative proposals; i.e.—S. 1453, sponsored by the Honorable Dennis DeConcini, U.S. Senator from Arizona; that suggest the division of military retired pay between a service member and a spouse or ex-spouse by a State or the Federal government.

I am C. A. "Mack" McKinney, a retired Sergeant Major, United States Marine Corps, and the Sr. Vice President for Government Affairs, NOCA.

I represent more than 250,000 noncommissioned and petty officers of the United States Armed Forces. Eighty three percent are on active duty with the Army, Navy, Marine Corps, Air Force and Coast Guard. The remainder consist of reservists, national guardsmen, retirees and former members of the armed forces.

PROLOGUE

NCOA, its directors, officers and members are truly sympathetic with the financial distress that many spouses and ex-spouses may be experiencing as a result of their marriage to a service-member. As it is for other spouses and ex-spouses of civilians, they are in need of some program or another that provides an income if they are unable to work, or have minor children to care for, or have contributed an appreciable amount of their time and devotion toward the marital years.

However, the Association's concern is not so much with what appears to be the proper thing to do, but whether or not Congress should amend the current statute to accommodate one group while ignoring the consequences, the inequities and the injustice that will occur if military retired pay becomes divisible under federal or state law.

For the spouses or ex-spouses, there are currently available more ways to insure an income from members of the U.S. armed forces than from almost any other group of employees in the United States. In addition to Social Security benefits, Dependents Indemnity Compensation (DIC) and Public Law (PL) 93-647 (that gives the spouse or former spouse the right to garnish the pay or retired pay of a service member), the military departments have a Survivors Benefit Plan (SBP) and regulations directing adequate monetary support of dependents.[1]

DIC and SBP provide the spouses an annuity in the event of the demise of the military member. In the SBP, the amount could be as high as 55 percent of the member's total military retired pay. The only ways to opt out are thru divorce or death.

The five programs noted are at least three pluses over those available in the civilian sector and at least two over those available in the Federal Civil Service

[1] For example: 32 CFR, Chapter VI, Subchapter C, Parts 733 and 734 (SECNAV INST. 7200.16 of Mar. 16, 1979.)

System. Most civilian employers are not responsible for the marital and paternity status of their employees. They become involved only through garnishment procedures.

RETIRED PAY NOT A PENSION

First, there must be an understanding of retired pay as it applies to the military. It is neither a pension nor an annuity.[2] It is actually a payment earned day by day after serving the required number of years in the active military, then "transferring" to a "reserve" status where the service member continues to be carried on the rolls of his or her military service. The retired member also retains the highest grade (rank) attained while on active duty and continues to be subject to military (as well as civil) law and must comply with certain requirements dictated by federal law or the Department of Defense. More importantly, he or she is subject to recall to active duty on orders of the President of the United States.[3]

The Supreme Court in *McCarty* v. *McCarty* verified in its ruling that retired pay is not a pension or an annuity. It admitted that it had concluded in an earlier case, *United States* v. *Tyler*, that "retired pay is reduced compensation for reduced current (military) services."

In short, retired pay is "retainer" pay and is fully taxable as are salaries and wages. It may be likened to the pay given to a consultant who is bound by the rules of employment, but may never have to perform on the job in order to earn a paycheck.

WHO EARNS RETIRED PAY?

One of the arguments raised by proponents of dividing military retired pay is that the spouses have earned the right to a portion of the pay because they were married to the military member while the latter was on active duty. It is difficult to concede to this line of reasoning when it is common knowledge that there is no eligibility established for nondisability retired pay until the member serves the required number of active years of service. If the years are less than prescribed by law, the member does not qualify for a retirement program.

For example, enlisted personnel, constituting nearly 87 percent of the armed forces, may serve 19 years on active duty then be denied further service or may voluntarily quit. He or she is not entitled to one red cent in severance pay or readjustment pay. In fact, a recent law prevents the voluntarily separating member from drawing even unemployment compensation.

It may be noteworthy here to cite a recent case of a Minnesota woman who worked to put her husband through college and medical school. She divorced her husband and later asked for "property rights" to his medical degree. The degree was given subsequent to the divorce.

Despite the court's sympathy for the woman, and agreeing that the wife did make sacrifices with the expectation of higher financial awards for the future, the judge ruled she was entitled to a restitution only for the period they were married.

The case runs parallel to that of the spouse who is married to a servicemember before he or she becomes eligible for retired pay and obtains a divorce prior to the retirement date. As the judge ruled in the case of the Minnesota woman that she has no property right to her husband's post divorce earnings, neither does the servicemember's ex-spouse.

The one concession that may be offered at this point is to the spouse or ex-spouse who is or was married to the servicemember after the 20th year of active service or who is now earning retired pay. However, the concession is withdrawn when one considers the number of restrictions placed on the receipt of retired pay.[4]

There are a number of military retirees not entitled to retired pay. A larger group must currently forfeit more than $5,000 annually if they work for the federal government. Some lose their retired pay because they are employed by a foreign government, some as a result of a court-martial (remember, the retiree is still subject to the Uniform Code of Military Justice) and others lose retired pay for two or more years if engaged in certain business transactions with the

[2] Webster's New World Dictionary, Second College Edition and Encyclopaedia Britannica, Vol. 17, 1965, p. 488.

[3] Sections 6481, 6482 and 6483, Title 10, United States Code.

[4] Section 802, Art. 2(4) and (6) and Section 6485(b), Title 10; and Sections 801(b) and (c), 802, 803 and 804 of Title 37 and Dual Compensation Act of 1964 and Section 3105 Title 38, all of the U.S.C.

Department of Defense. More restrictions are contained in Titles 5 and 10 of the United States Code.

Another reason why the concession is withdrawn is because none of the proposals offered in Congress or advocated by women groups offer the servicemember the right to their spouse's or ex-spouse's retired pensions or annuities. Currently, it appears to be a one-way street.

WHAT WILL HAPPEN?

Assume that the law is amended to authorize the division of military retired pay. Will the spouse or ex-spouse give up her right to all or a part of her share of the retiree's pay if the latter must forfeit his? Will the spouse or ex-spouse become subject to military law if she is awarded part of the retiree's pay? And will she serve part of the retiree's sentence if he is incarcerated for a violation of the Uniform Code of Military Justice or because of a commission of a felony?

As absurd as these questions appear to be to the layman, they must be resolved by our Nation's legislators before a fair and equitable decision can be made. Lawmakers will also have to determine whether or not they want to change the concept of retired pay so that it becomes a contributory program or a vested interest. At the present it is an incentive to attract and retain personnel in the armed forces. It is not designed to be a part of the compensation and benefit package until the member completes the prescribed number of years of active service.

As an incentive, it is not a reward for the spouse of the servicemember for enticing the husband or wife to join or remain in the armed forces. It belongs exclusively to the servicemember who executes the contract. For the majority, the commitment has been made years before the spouse comes on the scene as a married partner.

MILITARY AND FEDERAL SERVICE

Another argument that is now often used by spouses and ex-spouses is the recent changes in law affecting federal workers and foreign service officers. They believe that the legal language pertaining to the two groups can readily be applied to the military. This is not so because of the differences in the systems.

Foreign service officers' wives for the most accompany their husbands to overseas assignments. They are a vital part of the social scene that normally is a requirement of the officers' formal duties. The officers receive rather healthy salaries, have supplemental funds provided by the State Department for such activities, contribute a percentage of their wages to a retirement program and have a vested interest in that program in the event they do not perform the required numbed of years for retirement eligibility.

Federal employees also contribute a part of their salaries to a retirement program. They also acquire a vested interest in their retirement system. Unlike foreign service officers, however, not many of their spouses are required to augment the husband's employment by being a hostess for his social obligations.

This is true of military personnel. Few of the spouses are asked to perform social obligations that are outside their immediate cricle of friends. Yet, unlike foreign service officers and federal employees they do not contribute to their retirement program and have no vested interest therein. Military personnel do, however, contribute to a social security program and are eligible to draw benefits as a result of these contributions. As a part of the program, their spouses or ex-spouses may also be eligible for benefits. This is an entitlement that is not normally available to most foreign service and federal employees' spouses or ex-spouses.

This brings to mind another question. Will Congress have to make the military retirement system a contributory one if it gives spouses and ex-spouses a part of retired pay? Will it have to take military personnel out of social security and further jeopardize the program with billions of dollars in losses? It just isn't conceivable that Congress will do both and even more inconceivable to remove 2 million-plus people from the social security system. Yet, if it permits spouses to have a part of military retired pay, a contributory system will have to be initiated.

Here is where the trouble begins. With only one of every 10 to 12 servicemembers remaining long enough to earn retired pay, only a nightmare of administrative problems will result in any program developed.

WHERE IS THE INCENTIVE

The third reason military retired pay should not be a subject of community property was alluded to in an earlier paragraph. Retired pay is a promise to an individual for entering and remaining in the active service for a specified period. The promise is given by the government to the servicemember. No monies or benefits are exchanged other than the amounts given to a person of the same grade and length of service regardless of a commitment to serve or not to serve the minimum number of years. No contract is signed. If the individual does not perform, there is no retired pay.

Should retired pay be split between the servicemember and the spouse or ex-spouse, the promise of retired pay for services rendered will no longer become an incentive. As the Superme Court noted in the case of *McCarty* v. *McCarty*, "The value of retired pay as an inducement for enlistment or reenlistment is obviously diminished to the extent that the servicemember recognizes that he or she may be involuntarily transferred to a State that will divide the pay upon divorce." Applying this universally as a federal statute would further damage the concept of earning retired pay. Many military personnel would think more than twice before committing themselves to the possibility of loss of part of their retired pay sometime in the future.

Expanding somewhat further on its ruling, the Supreme Court held that: "Moreover, the application of community property principles to military retired pay threatens grave harm to 'clear and substantial' federal interests. Thus, the community property division of retired pay, by reducing the amounts that Congress has determined are necessary for the retired member, has the potential to frustrate the congressional objective of providing for the retired servicemember. In addition, such a division has the potential to interfere with the congressional goals of having the military retirement system serve as an inducement for enlistment and reenlistment and as an encouragement to orderly promotion and a youthful military."

OTHER THOUGHTS

Other federal agencies have also offered arguments against federal statutes being amended to accomodate ex-spouses. The U.S. Civil Service Commission (now the Office of Personnel Management) strongly opposed an earlier Schroeder bill that would have divided the retired pay of federal employees. It said that passage of the proposal would not only present an administrative difficulty but would be costly and involve "the system in problems which are and should remain under the jurisdiction of the courts." Additionally, it noted that such a law would penalize the federal employee because a former marriage didn't last regardless of which party was at fault.[5]

The General Accounting Office reiterated this belief by reporting that: "In general, we believe the current provision in the civil service and Foreign Service retirement systems of allowing the courts to decide, on a case-by-case basis, whether, and in what amounts, retirement benefits should be apportioned between Federal retirees and their former spouses are preferable to automatic apportionment of these benefits . . ."[6]

On this basis, and in consideration of the moral obligation involved, there is little opposition voiced against the current law that permits garnishment of military retired pay. True, the individuals may have to go to court to resolve the question of alimony and support, but this is necessary in a majority of divorce cases where the ex-spouse believes he or she is entitled to more than what is agreed to, or if the agreement is not honored by the other party. In any case, who is better qualified to adjudicate the problem other than a judge of the court. This is the most reasonable way to determine who is at fault and who has the greatest need.

For example, an automatic division of retired pay would not take into account the need for a fully-disabled retiree whose ex-spouse is mentally and physically capable of full or part-time employment. On the other hand, if the ex-spouse is unable to work, the court under current law can force a retiree who is employed to contribute a greater proportion of income to the ex-spouse.

CONGRESSIONAL INTERESTS

Of concern is the pursuit of federal legislation by members of Congress whose States do not permit alimony or garnishment, as in the case of Texas, or have

[5] House Report No. 95–713.
[6] GAO Report, B–199338, d & d. 28 Jul 80.

ruled that military retired pay is not community property ; i.e.—Colorado.[7] Members of the Texas congressional delegation should concentrate on affecting a change in their state law rather than asking the federal government to spend millions of dollars and thousands of manhours to amend the U.S. Code.[8]

In contrast, Colorado residents who are ex-spouses, as those in most other states, have two or three means to collect financial support from their former military spouses. If the latter is on active duty the ex-spouse may appeal to the military commander. Military directives are firm in their commitment that a servicemember must care for his or her family. If not, the member faces disciplinary action.

This is unique in itself. Not many if any civilian employers including the federal government issues similar rules affecting employees.

The second means is through the courts. The ex-spouse can win an award of alimony and/or child support and garnishes the paycheck of either an active duty or retired servicemember.

The third is through the receipt of social security benefits when eligible under the law. As noted in the Supreme Court decision : "Upon satisfying the necessary age requirements, the (military) retiree, the spouse, and ex-spouse who was married to the retiree for at least 10 years, and any dependent children are entitled to Social Security Benefits."

WHO WILL HAVE A RIGHT?

There is yet another point to consider. It is the inequity that will be imposed on the military retiree if a spouse or ex-spouse is given an entitlement to part of his or her retired pay.

Should the law be amended to give the spouse or ex-spouse a right to an automatic or judicial division of military retired pay, one party will have an entitlement, the other will not. In two decisions rendered by the U.S. Court of Claims, a 1966 ruling denied that military retirees have a vested interest or a contractual right to their retired pay[9] and, again, in 1972 concluded that : "the general rule has long been that '(a) soldier's entitlement to pay is dependent upon statutory right * * * (and not upon) common-law rules governing private contracts * * *.'"

In essence, it is not fair to award an entitlement of a part of the servicemember's retired pay to a spouse or ex-spouse when the military retiree does not have either a vested interest nor a contractual right to retired pay.

CONCLUSION

Mr. Chairman. The NCOA does not need to remind this panel of its responsibility to protect the interests of the military member by providing adequate compensation for whatever that member does, is or will be as a member of the armed services.

Of course, it is not enough to furnish adequate compensation without insuring that it is or will not be lost through unprecedented means no matter how well-intentioned they might be.

In conclusion, NCOA urges the subcommittee to reject S. 1453 or any similar bill that even remotely considers military retired pay as a community property (in whole or in part).

Prepared Statement by Tish Sommers, President, Older Women's League, Oakland, Calif.

Distinguished members of the Subcommittee, the Older Women's League was unable to present oral testimony because of time limitations of the scheduled hearing, and so we offer this statement on behalf of S. 888, Title I, Subchapter III, on retirement benefits for ex-spouses of military personnel. Our organization has a particular concern for this issue. Launched less than one year ago, with fifty chapters now spread nationwide, OWL is focusing upon pension justice for older women. We were charter supporters of S. 888.

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[7] Navy Times, Apr. 18, 1977.

[8] The Comptroller General, in decision B–190985, gave military services legal basis for refusing to follow Texas community property attachments of military retired pay. Again, in another decision, B–191592, the CG ruled the government is in error if it garnishes federal wages or pensions based on community property settlements.

[9] HASC Rept. No. 92–78, p. 16291.

We endorse the efforts of military wives' organizations who are most directly concerned, but wish to stress that what happens here will affect all women, particularly those of us who have performed traditional homemaker roles for the major part of our lives.

This statement will address the following: the inequity of treatment of military ex-wives compared with beneficiaries of other pensions, both public and private; the implications of the McCarty decision on states rights and domestic law; the specific problems of ex-spouses of military personnel; and the extent to which the propoesd legislation will redress the problem.

INEQUITY OF TREATMENT

With the spread of no-fault divorce and with the growing number of older women who have been homemakers who find themselves in later years alone and with inadequate retirement benefits, changes have been made in public policy to address the plight of these women, in part to prevent them from becoming a burden on the state. As a result, federal laws governing public pensions have been revised. In 1980, Public Law 96-465 recognized that foreign service wives do indeed contribute to the national good, and have an earned right to a pro-rata share of the pension, in case of divorce. Public Law 95-366 authorized the assignment of retired pay of a civilian federal employee to a former spouse in accordance with a property settlement. In other words, domestic law courts may divide civil service pensions as they see it.

The recent Budget Reconciliation Act began to address the case of ex-spouses of Railroad Retirement workers by mandating that divorced wives and widows of Railroad workers are eligible for a railroad annuity in an amount equal to what they would be eligible to receive had their spouses worked in employment covered by social security.

Meanwhile, state courts, which traditionally have had jurisdiction over domestic law, have been moving strongly in the direction of recognizing pensions as marital property, to be divided between spouses on dissolution of marriage. All but three or four states now consider pensions as divisible property.

It is ironic, then, that the wife who personally sacrifices most for her family and for her country and is in a most vulnerable position should she be divorced in later years, is the only one who currently has no vested interest in retirement benefits she helped to earn.

IMPLICATION OF THE M'CARTY DECISION

The basic significance of this Supreme Court decision, which negated a court ordered property settlement dividing a military pension, was to throw the ball back into Congress's court. On the assumption that Congress has full discretion when it comes to defense matters and military laws, the Court examined congressional intent in regard to division of retirement benefits. Finding none expressed in the law, the Supreme Court had to "infer" that intent. Since the military act is silent on the subject, the majority opinion inferred that Congress did not want divorced wives to receive a share of the pension, even when the divorce court had included a share for the wife in a judgment.

Does Congress, and specifically this committee, really *want* ex-wives of military personnel to become a burden on the taxpayer? Or has it just not addressed the question? The Court has stated that it is Congress's right—and responsibility—to make that decision. Women across the country will be watching to see what action is taken.

The implications of what Congress does on this issue go far beyond the small segment of women who are directly affected. By passage of this bill before us, Congress will be taking a step to bring federal pension law in line with domestic law as generally recognized in state courts, presumably the arbiter in this field. By remaining silent, and thus acquiesing in the "implied intent" as interpreted by the Supreme Court, Congress will be turning back the clock on recognition of marriage as a partnership, and will threaten the statutory structure developed to achieve economic justice upon divorce. ERISA covered pensions may be the next casualty.

SPECIFIC PROBLEMS OF EX-SPOUSES OF MILITARY PERSONNEL

Military wives are particularly vulnerable in case of divorce. Because of the recency of Social Security coverage, they are likely to have scanty retirement

benefits from this source, if any. The notorious mobility of army families makes it far more difficult for wives to develop vested pension credits, even when jobs are available. Because of that mobility, fewer military wives have acquired a home to be divided as common property. Like foreign service wives, military wives, especially those of officers, are expected to be part of the team, and to participate in army endorsed activities. In verbal commendations, wives are described as making an essential contribution to the well-being of the Army and its patrictic goals, and their personal sacrifices are lauded to the skies.

What, then, if a wife who has raised her children under the difficult circumstances of long absenses by the father, is replaced when she is in her fifties by a younger woman? This is certainly a practice which is more and more common, in and out of the military. Alimony is becoming rarer and time-limited (usually 2 to 4 years), and is unpaid in most cases. Because she is an older woman long out of the job market, her chances for anything but minimal pay employment are slight. Even when she finds work, she cannot build up credits for a pension in her own right. She is simply a discard, and her survival will be dependent upon the shrinking safety net of social programs for the poor. Unable to remain in employment the necessary ten years to vest in her own pension, and although subject to unpaid service to the nation in order to further her husband's career, this former military wife will be forced to turn to public assistance in her later years.

It is, therefore, a matter of prudent public policy, as well as a question of simple justice, that she share with her ex-husband the benefits which they both worked so hard to obtain.

EXAMINATION OF THE PROPOSED LEGISLATION

The most important point of S. 888, Title I, Subchapter III, is that it clearly states Congressional intent. It makes it clear to the courts that a military pension can be divided at divorce, as can other pensions. Further, it states that, unless otherwise provided by a spousal agreement or court order, a divorced spouse is entitled to a pro rata share of the pension. In other words, divorced spouses are presumed to be entitled to a share of the pension, unless the domestic relations court orders otherwise, as is the case with foreign service wives.

The bill would also provide widow's benefits to a former wife married at least ten years, thereby bringing it into accord with social security. Title I of S. 888 also requires a decision in writing before a notary public on whether to take or refuse a reduced retirement benefit that would later provide widow's benefits. The number of military personnel who currently opt for no survivors' benefits is notoriously high, and currently no such notice to spouse or former spouse is required.

There are other problems which are not considered, of which the plight of military wives who are already divorced by the date this section becomes effective, is the most compelling. Or if the husband dies before this section becomes effective, no widow's benefits would be available to the divorced wife. It also does not address the problem of ex-husbands who do not pay court awarded settlements. Would it not be possible to provide for the ex-wife's share to be paid directly to her? In addition, if a woman remarried before age 60, she would not be eligible for benefits. Despite these problems, the section as stated is a significant step forward.

The most important question for this Committee to keep in mind is that marriage, whether military or civilian, is an economic as well as personal and sexual partnership. In the words of Justice Robert Gardner of the California Court of Appeals, "A woman is not a breeding cow to be nurtured during her years of fecundity, then conveniently and economically converted to cheap steaks when past her prime." The Older Women's League, in accord with women's organizations across the country of every persuasion, ask that you recommend this legislation to set the record straight.

PREPARED TESTIMONY OF THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

The American Association of University Women, the oldest and largest organization for the advancement of women in the US, welcomes this opportunity to address the Subcommittee on Manpower and Personnel on the issue of retirement income for divorced spouses of military personnel. Our Association, in its 1981–83 Legislative Program, recognizes and supports the contributing role of

the homemaker in society. Therefore, we are pleased that this Subcommittee has deemed it important to discuss the fate of thousands of divorced spouses of military personnel who currently are without any source of retirement benefits, except their spouse's Social Security. Despite the long-term and significant contribution of the woman to the household, military pensions are considered to be property only of the wage earner and not of his wife. Pensions have long been considered by the courts, in case of divorce, to be part of the joint marital property subject to division by court decree. Pensions of retired military personnel, in divorce cases, however, have been designated a special class, since the Supreme Court decision of *McCarty* v. *McCarty*, which declared that military retirement pay could not be considered community property, and thus was not subject to property division laws of individual states. The AAUW believes that the *McCarty* decision in no way reflects the realities of military life, nor does it serve to remedy a situation which continues to be a sad chapter in our nation's callous and myopic vision of the economic contribution of women to the home.

Several bills have been introduced in past Congresses and in this one which seek to remedy the inequities of the division of military pensions in case of divorce. In the Economic Equity Act, S. 888, introduction on April 7, 1981, there is a separate section which specifically addresses the question of military pensions and the need for equity in division of retirement pay upon divorce. According to this bill a former spouse, male or female, would be entitled to a pro rata share of a serviceman's retirement pay if the couple were married at least ten years. This bill is based on the premise that marriage is an economic partnership.

Several alternative plans also have been offered to remedy the question of retirement pay. For example, there sometimes exists a problem for former spouses in collecting retirement pay because the pension recipient leaves the jurisdiction of the court which issued the divorce decree. One bill, H.R. 1711, introduced in the U.S. House of Representatives in February 1981 by Mr. Kent Hance, would authorize the Secretary of Defense to make direct payments of the former spouse's share of the pension directly to him or her. Such a provision already exists for former spouses of Civil Service employees (PL 95–366). Other bills, such as Senator Hatfield's S. 1648 are more extensive in scope.

As a result of *McCarty* v. *McCarty*, millions of men and women will suffer divorces without any hope of receiving part of a former spouse's pension. But the problem of receiving the pension share after a court division of property is only half the story. Ex-wives of servicemen lose medical benefits, the right to be named beneficiary on the pensioner's life insurance, and all post exchange privileges. Even if the pensioner elected survivors' benefits during their marriage, the ex-wife is not eligible for any share of it at his death.

Most women who are ex-wives of servicemen find themselves in the sad predicament faced by so many women who have dedicated their lives to homemaking and raising a family. These women lack employable skills and job opportunities to fit their needs and abilities. Military wives are particularly vulnerable in the employment area since they often move around so frequently that opportunities for permanent employment in different localities are very difficult. Some statistics which underscore this point are the percentage of military wives in the labor force compared with the non-military population, and the significant earnings gap and unemployment rate in these two groups. While 52 percent of the workforce is female, only 43 percent of military wives work (1977 figures). The average yearly earnings for civilian women range from $4117–$6610 compared to military wives who earn $2699–$5649, substantially less. Furthermore, while the average unemployment rate for women of working age is less than 8 percent, among military wives it is double, 16 percent.

We realize that the purpose of these hearings is exploratory in nature. The problem of ex-military spouses will be discussed and remedies for previous inequities set forth. The AAUW supports the efforts of Mr. Jepsen in this area. Recognizing the problem is the first step toward a solution. Time, however, is of the essence. Today, one of three military marriages ends in divorce. Many military spouses face the prospect of raising children without adequate financial assistance and an old age with little or no source of retirement income.

Congress has made provisions for former spouses of Foreign Service recipients. It has also taken into account the need to accord Social Security benefits to former spouses. Ignoring the needs of former spouses of military personnel is not only incongruous from a public policy perspective, but also from that of our

nation's security. Our armed forces need skilled personnel. They also need laws which support the development of family life under the peculiarities of military life. The failure to recognize the contribution of the homemaker in a military household is to ignore the basic economic partnership of marriage. If marriage fails, even in a military environment, spouses should not be refused a share of the pension which they rightfully deserve.

Appended to this testimony is a statement by AAUW member Donna Reed Wickstrand of Gaithersburg, Maryland which discusses her own situation as a former Navy wife. This statement should be read as a single example of the plight of thousands of women for whom pension and retirement funds are almost non-existent despite long-term marriages and lives dedicated to accommodating a military lifestyle. Ms. Wickstrand's case graphically demonstrates the difficulties an individual faces when she has been out of the paid work force for many years, and in the few work years remaining must build for herself an adequate retirement fund.

The American Association of University Women urges the members of the committee to take immediate action to ensure that ex-spouses receive a share of their spouse's retirement pay as part of the divorce settlement. We further believe that the federal government should force such payment of a pensioner's share to his or her former spouse once the local courts decide on the appropriate settlement. Finally, we suggest that this committee request that the Assistant Secretary of Defense for Manpower and Personnel be ordered to study the broader question of military divorces, and the economic consequences that current provisions for property division have on former spouses. A public education program is needed to inform spouses of their rights to survivors' benefits, pensions and other privileges. Only by efficiently combining these actions into law might we begin to see years of injustices finally ended.

[Attachment.]

TESTIMONY OF DONNA REED WICKSTRAND, MEMBER, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

Mr. Chairman, and members of the sub-committee, I am Donna Reed Wickstrand, member of the American Association of University Women and former Navy wife.

I was the wife of Don R. Wickstrand 23 of the 24 years he was on duty with the United States Navy. At the time of his retirement in January 1980, he had attained the rank of Captain, was retired with full Navy pension and had taken a well paying position as a Consultant/Program Manager in the private sector.

As a Navy wife, it was clearly understood that I would support him and his career in lieu of my own. I did teach school two years before we were married and two years after we were married while he was obtaining his Masters Degree at night at George Washington University. During the 23 years in the Navy we moved house 13 times, and had several extended stays in hotels, motels, inns or with friends while relocating. Twelve of the 23 years were spent overseas in Japan (3 years), Spain (3 years), Italy (2 years) and England (4 years). We lived on the local economy 7½ years of the 12 oversea, which was an experience in itself in many instances. In each of these overseas assignments, I endeavored to learn the language and was involved in people-to-people programs, along with just being a good neighbor. I was an active contributing member of the Officers Wives groups; volunteered as a Gray Lady in the hospital in Spain; was involved in community activities; entertaining in connection with my husbands career; and taking an active interest in the culture and country in which we were living. Three daughters were born of our marriage, Sally, 6/13/59; Julia, 2/16/61, born at the Field Station Dispensary in Chitose, Hokkaido, Japan; and Heidi, 3/3/64. My responsibilities as a mother included making a home for them in each new assignment, being a Room Mother, setting up volunteered programs at school, PTA, assisting with Brownies/Girl Scouts etc. I wouldn't have traded those years for anything! I shouldered the responsibilities, endured the hardships, and gave my best effort in those years out of love for my husband and daughters. The one continuing stable incentive in this life style was the promise of security in the form of a pension and continuing medical care for life.

Unfortunately at this time of my life, my husband, having renewed a relationship with another woman, wants a divorce. The years we spent together as husband and wife within the Navy prepared him for a number of well paying second careers, not to mention a comfortable pension and medical care for the rest of

his life. When our divorce is final, under present law, I shall have nothing as the divorced military wife. Since I was not able to pursue a profession during the years my husband was in the Navy, I am not working on developing some skills that will enable me to work. I am presently involved as an Intern in the Student Financial Aids Office at Montgomery College and I am enrolled in the Masters Degree program at George Washington University, which is necessary to my growth in a profession.

At best, considering my age, job opportunities, and time to develop a pension fund, my prospects are limited. Medical health coverage could be a problem. I am in fairly good health, although I am taking medication for hypertension and do have arthritis.

I do feel that legislation, at the Federal level, must be enacted to correct the inequities dealing with the divorced wives of military men. The Military is a part of the Federal Government. Military pensions should be considered in the division of property during the divorce and some medical coverage should be made available to the divorced wife. Senate Bill S. 1648 introduced by Senator Mark Hatfield would be a most important piece of legislation at this time.

Tuesday, October 6th marks the 25th anniversary of the day I married a young Navy officer, in the shadow of Mt. Hood at Brightwood, Oregon. Until recently I thought this was going to be a very special occasion.

Mr. Chairman, and members of the sub-committee, thank you for taking the time to read this testimony.

PREPARED STATEMENT BY CAROL BURROUGHS GROSSMAN, NATIONAL PRESIDENT, WOMEN'S EQUITY ACTION LEAGUE

Senator Jepsen and members of the Subcommittee, the Women's Equity Action League is pleased to offer this statement on behalf of widows and former spouses of military personnel as you consider the pension and retirement needs of military families.

WEAL is a national organization, founded in 1968, and is dedicated to securing and protecting equal rights for all women. WEAL's commitment to economic equity has resulted in our special interest in the problems of military wives, widows, and ex-wives both as homemakers and as members of the labor force. The Supreme Court decision in the McCarthy case has spotlighted the difficulties of former military wives and has caused consternation among many wives of active duty personnel. It is now up to Congress to take action which will alleviate the fears and economic uncertainty surrounding this issue. WEAL is appreciative of the leading role this subcommittee has taken in scheduling hearings to examine the relevant proposed legislation.

Most of us agree that marriage is a partnership, both economic and emotional. Some wives make a direct economic contribution to the family by working outside the home, while others make an indirect contribution by supporting their husbands' careers and fulfilling family and home responsibilities. Traditionally military wives have fallen into the latter category.

Today many women who were in homemaker roles for many years have become widows or divorced spouses, and many of these are in desperate situations. Fifty-two percent of women 65 and over and 69 percent of those 75 and over were widows in 1978, compared with 14 and 23 percent respectively for men in the same age group.[1] The average widow who does not remarry and who dies a natural death will live 18½ years as a widow.[2]

Consider the widows of retired military men. Half of these widows do not receive any portion of their husband's retired pay upon his death. Public Law 92-425, the Survivor Benefit Plan, was passed by Congress in 1972 with the purpose of providing an annuity for the women who have stood "alongside their husbands throughout their military careers."[3] The survivors' benefit is automatic unless the serviceperson opts out in writing: clearly Congress intended survivors' benefits to be used, except in unusual cases. Today, however, only 50 percent of all military retirees elect survivors' benefits. The following statistics were provided by the Department of Defense Office of the Actuary, Defense Manpower Data Center:

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[1] Statistical data is derived from the U.S. Department of Commerce, Bureau of the Census, Social and Economic Characteristics of the Older Population: 1978, unless otherwise noted.

[2] Carol J. Barrett, "Women in Widowhood," Signs, (summer, 1977), p. 865.

[3] The Congressional Record, September 8, 1972, p. 29812.

Participation: Fiscal Year 1980 Retirees Who Elected SBP (did not opt out).

[In percent]

	Newly retired	Total retired
Enlisted persons	38	42
Officers	69	67
Total	49	50

Retirees usually cite cost of the program as the reason for opting out. The following statistics, which were computed using information on salaries and formulas given in the 1981 Uniformed Services Almanac, provide examples of the cost per month of full spouse coverage under the SBP:

	Enlisted (E-7)	Officer (O-5)
Retirement pay per month	$715.61	$1,511.07
Cost of full spouse coverage	$49.06	$128.61
Percent of retirement check taken out for SBP	6.9	8.5

The above figures are calculated for the average retiree, who has 22 years of service, according to the latest figures. If the retiree should die, the surviving spouse would receive 55 percent of the retirement pay under the SBP: for the average enlisted person, $393.59 and for the average officer, $831.09. Without SBP, the surviving spouse receives nothing until he or she is old enough to receive Social Security.

S. 1648 (Hatfield, R-OR) and H.R. 3039 (Schroeder, D-CO) would make a needed change in the Survivor Benefit Plan: Survivors' benefits would be automatic unless both the military member and the spouse opt out in writing. WEAL believes this change to be absolutely essential: it gives the person most directly affected—the survivor—a role in the economic decision-making. These bills would also make it possible for a former spouse to receive survivors' benefits. Under the current plan, there is no such possibility except in a very limited number of cases.

The Department of Defense and groups such as the Retired Officers' Association have made much of the fact that widows and divorced spouses of military personnel are covered by Social Security. Because of this protection, the argument goes, changes in the Survivor Benefit Plan are not needed, and neither is a share of the military pension for a former spouse required. Yet military personnel have Social Security, but still need retirement pay in addition to it. Indeed, a great deal of money could be saved if military retirement pay were eliminated. We do not advocate this course of action for an obvious reason: Social Security was never intended to be the primary source of retirement income for anyone. The average income from Social Security for all women over 65 is $3649 annually.[4] WEAL does not believe this is adequate compensation and no widow or former spouse should be expected to live solely on this amount.

Furthermore, Social Security cannot be collected by a former spouse until the serviceperson retires from all employment. In most marriages of ten to thirty years duration, the partners are not at retirement age at divorce. In many cases, former spouses have no income for many years, although the serviceperson, after twenty or more years in the military, draws military retirement pay while engaging in a second career.

Obviously, the former spouse must have an income. There are several possibilities for acquiring this income, none of which is particularly attractive. First, the spouse can depend upon the settlement made at divorce. Most military families do not acquire much property, so there is little to divide. They are especially unlikely to own homes because of frequent moves and requirements in many places to live in government housing. Therefore, the ex-spouse must depend upon alimony and child support. Representative Schroeder and others have testified that the Census Bureau reports that only 4 percent of divorced

[4] Social Security Administration, Baltimore, Maryland, July 1981.

women receive alimony. Further, although women are awarded child custody in 98 percent of divorce cases, only 22 percent of them receive child support. The garnishment process does not work: it is usually for a limited time, is expensive, and must be started again every time the serviceperson moves. Clearly, only a tiny fraction of ex-spouses can depend on a divorce settlement to provide them with an income.

A second possibility for generating income is obvious: the ex-spouse should go to work. The problem with this for the younger divorced woman is that she probably has custody of minor children, and child care is expensive. Because of the nature of military life, many women have never worked outside the home. If they have, their jobs are likely to have been low-paying, entry-level positions. It is therefore unlikely that they will be able to earn an adequate income, especially in the period shortly after the divorce without further education and training.

An older divorced woman attempting to enter the labor force is at an even greater disadvantage in many ways than the younger woman. The number of such women who are former military spouses is often underestimated. The Department of Defense does not keep statistics on divorces of military personnel, but it is probable that the divorce rate in the military equals or exceeds that in the general population. The American divorce rate is now approaching 50 percent. In 1975, the most recent year for which such data are available, 33.4 percent of all divorces occurred in marriages of ten years or more while 11.8 percent of all divorces occurred in marriages of twenty years or more.[5] Today there are over one million married military personnel. For present active duty personnel alone, then, one can conservatively estimate that there are 170,000 divorced wives of over ten years marriage and 60,000 divorced wives of over twenty years of marriage. This number is not negligible, particularly when one considers that there is probably at least an equal number of divorced spouses of retired personnel.

The following information from a WEAL Fact Sheet tells the story: among people over forty years old, unemployment is 33 percent higher for women than for men. Eighty percent of working women are concentrated in sex-segregated, low-paying, low-benefit, low-status jobs. The earnings gap between men and women widens with age. While the average woman earns 59 percent of the average man's wages, women over the age of 45 earn only 55 percent.[6] The average unemployed woman over 55 remains jobless for nineteen weeks.[7] The chances for these women to begin careers and accumulate pension and retirement benefits are slim.

One needs to remember that for all these former military wives, young and old, there are new and unusual expenses after divorce. Among the benefits of military service are free or inexpensive health care and the use of post exchanges and commissaries. Upon divorce all of these benefits are lost. The cost of health insurance alone, especially for an older woman, is considerable.

Going to work, at the first available job, may not provide an adequate income. There is one other method for generating an income, to which increasing numbers of women apparently will have to turn: they can go on welfare. The American people will have to support these women who are unable to receive military pension shares. WEAL does not believe this is fair. We believe that the government is obligated to insure that these pensions are divided equitably.

Much has been said about the possible effects of the McCarty decision on military retention. WEAL will add only this: it is unreasonable to expect a military spouse or prospective spouse to fulfill the traditional role of the military wife in view of the fact that such a life guarantees no security for her or for her children. If the message is that she must provide for her own future, then she must do so by working outside the home in a job that will provide retirement benefits. She must either refuse to accompany her husband when he is reassigned, or she will convince him to leave the military. To do otherwise would be economically foolish and irresponsible. In either case, the result will be a weakened military. Soldiers with family problems are not good soldiers.

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[5] Statistical data is derived from 1975 material in Vital Statistics of the U.S. Vol. 3, Marriage and Divorce, National Center for Health and Human Services, 1979.

[6] Debra Iles, Fact Sheet: Age Discrimination in Employment . . . and Women, Women's Equity Action League, Washington, D.C., 1981, p. 1.

[7] Tom Gabe, "Social Characteristics and Economic Status of the U.S. Aged Population," Congressional Research Service Report No. 81-32 EPW (CRS: Washington, D.C., January 27, 1981), p. 36.

In order that widows and former spouses of military personnel have adequate incomes, WEAL supports all the legislation considered by this subcommittee: S. 1648 (Hatfield), S. 1453 (DeConcini), H.R. 3039 (Schroeder), and H.R. 1711 (Hance). We believe that all of these pieces of legislation contain desirable features. We further believe that no single bill is completely adequate. WEAL urges this subcommittee to work with the Congress people involved in draft comprehensive legislation that is fair—not only to widows and former spouses, but to military personnel as well.

WEAL believes that the comprehensive legislation must contain three elements: (1) the spouse or former spouse must share in the decision to elect or opt out of the Survivor Benefit Plan, (2) the former spouse must be entitled to a pro-rata share of a military pension in a marriage of ten years or more, subject, of course, to court review, (3) provision must be made for direct payment of alimony, child support, and retired pay share by finance centers to former spouses. WEAL also believes that these provisions should be made retroactive.

The Department of Defense has told this Subcommittee that the federal government should not be directly implicated in the decisions of State courts in domestic matters. This is one reason given for opposing a pro-rata share of a military pension for an ex-spouse. We do not believe that it is a function of the Department of Defense to tell Congress the kind of legislation it should enact. We have heard testimony from many groups, including DOD, a fact which clearly indicates that there are differences in the ways in which the various states handle divorce cases. We have seen that there are some states that are, perhaps, overly generous to former spouses, and some that provide them with little or nothing. WEAL believes that it is entirely within the powers of the Congress to pass a uniform federal law to govern the division of a federal—in this case, military—pension. This is surely a better and more responsible solution to the problem of inequities among the states than the solution offered by the Department of Defense: "it may be appropriate for state authorities to consider changes in their domestic relations laws."[8] Will DOD advise military families to avoid states who haven't updated their laws?

Both DOD and the Retired Officers Association have testified that there would be many administrative and technical difficulties in connection with pro-rata pension sharing. We feel that these details can be worked out with the cooperation of the groups involved. There is a precedent for the pro-rata sharing in the case of former Foreign Service spouses. The objection has been made that Foreign Service spouses constitute a much smaller group than military spouses. WEAL does not believe that equity given a small group should be denied a large group simply because it is large.

In closing, WEAL would like to thank this Subcommittee for the opportunity to submit this statement. We look forward to working with you in helping to insure the passage of badly needed legislation to aid military widows and former spouses.

Senator JEPSEN. I thank each of the witnesses today, and will declare the subcommittee hearing closed.

[Whereupon, at 12:55 p.m., the hearing was adjourned.]

[8] R. Dean Tice, Lieutenant General, U.S. Army, Deputy Assistant Secretary of Defense for Military Personnel and Force Management, statement before the Armed Forces Subcommittee on Manpower and Personnel, United States Senate, September 22, 1981.

UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT

WEDNESDAY, FEBRUARY 10, 1982

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE ON MANPOWER AND PERSONNEL,
Washington, D.C.

The subcommittee met in open session at 2:45 a.m. in room 224, Russell Senate Office Building, Senator Roger W. Jepsen (chairman) presiding.

Present: Senators Jepsen, Cohen, Denton, and Exon.

Staff present: Paul C. Besozzi, minority counsel; David S. Lyles, José E. Martinez, Anthony J. Principi, professional staff members; Richard D. Finn, and Ralph O. White, Jr., research assistants; and Jacquie S. O'Brady, staff assistant.

Also present: Buzz Hefti, assistant to Senator Warner; Jim Dykstra, assistant to Senator Cohen; Jon Etherton, assistant to Senator Jepsen; Jean Streeter, assistant to Senator Cohen; Paul Schreiber, assistant to Senator Denton; Don Imgram, assistant to Senator Quayle; Gray Armistead, assistant to Senator Byrd; Greg Pallas, assistant to Senator Exon; and Erma Engelkes, assistant to Senator Denton.

OPENING STATEMENT BY SENATOR ROGER W. JEPSEN, CHAIRMAN

Senator JEPSEN. The meeting will be in order.

On November 4, 1981, I introduced S. 1814, a bill designed to remedy some of the problems experienced by former spouses of members of the uniformed services.

This legislation is in response to the Supreme Court decision in the case of *McCarty* v. *McCarty*. It was in that decision that the Supreme Court held that absent a Federal statute permitting such action, a State court may not order a division of military retired pay as part of a distribution of community property incident to a divorce proceeding.

The court did not express an opinion on the propriety of whether military retired pay should be subject to State court orders. It merely stated that since Congress never has said affirmatively that it is subject to such orders, it is not.

I will read that again. It merely stated that since Congress never has said affirmatively that it is subject to such orders, it is not. The Supreme Court left it to the Congress to make that policy decision.

Writing for the majority, Justice Blackmun stated, and I quote:

> We recognize that the plight of an ex-spouse of a retired service member is often a serious one. Congress may well decide, as it has in the Civil Service and Foreign Service context, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have re-emphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs.

S. 1814, unfortunately, has been the subject of an enormous amount of misinterpretation and misinformation. Therefore, let me state as clearly as I am able what this legislation does and does not do.

First, it does not give a former spouse any part of military retired pay.

It does not vest in a former spouse any share of military retired pay.

It does not make the retired pay the property of the spouse.

It does not create a Federal divorce law.

It does not create any entitlement.

It does not alter the base purpose of military retired pay.

It does not give an ex-spouse any right to sell, transfer, assign or pass by inheritance any share of a member's retired pay to anyone, including a boyfriend, children or new husband.

It does not require any service member to pay anything to a former spouse that a court of competent jurisdiction has not already determined is owed and shall be paid.

On the other hand, this is what S. 1814 does:

It permits State courts to treat military retired pay in accordance with State law, much as they now also treat retired pay of Federal civil servants, Foreign Service personnel, private sector employees and all Senators and Congressmen.

It recognizes certain Federal interests in military retired pay and guarantees that a substantial portion cannot be touched by State courts.

Unlike the garnishment law, it provides for a continuing and efficient method of enforcement of valid court orders for child support, alimony and property settlements.

It prohibits any court to compel any person to retire in order to make payment to an ex-spouse.

It allows a service member to voluntarily, and I emphasize voluntarily, elect to name an ex-spouse as a beneficiary under the survivor benefit plan.

Now the task of reaching a determination as to appropriate legislation has been difficult, difficult because I have attempted to draft a bill that constitutes a balancing between valid Federal interests in military retired pay of a service member and State interests in property rights of spouses.

We have also attempted to balance the interest of former spouses in continuous and effective enforcement of court orders and the interests of military retirees in their pay.

Additionally, we have had to consider a myriad of State law concepts from community property to equitable distribution.

The task is not complete and I shall continue to work to improve S. 1814. In this regard I have heard many concerns expressed over the impact that S. 1814 and similar legislation would have on the personnel management needs of the services. Specifically, rumors

persist that this type of legislation will adversely affect recruitment and retention and the timing of retirement.

However, I have not seen any empirical data to support these concerns. Nor am I aware of such adverse effects as a result of the division of military retired pay in community property and equitable distribution states prior to the *McCarty* decision. We cannot deal with this issue based on supposition and emotions. We need facts.

The Department of Defense was originally scheduled to testify today before the subcommittee on its position on S. 1814. Unfortunately, the Department has asked for a delay in its appearance because it has been unable to reach a unified position on this bill. I am naturally very disappointed with the Defense Department's latest request for more time.

This subcommittee held its first hearing on the rights of former spouses to military retired pay on September 22, 1981. At that time the Department of Defense testified that it expected to reach a unified position on this issue in about 20 days.

When the subcommittee didn't hear from the Department, I wrote Secretary Weinberger on November 6 to request a position by November 18. Again, the only official response I received was more than 1 month later on December 23 when the DOD General Counsel finally informed me that the Department expected to achieve a coordinated position by the end of January.

Of course, that deadline has passed so that almost 5 months after the first promise was made the Department is still unable to report its official views to this subcommittee.

Needless to say, I am disappointed by this. The upheaval caused in our domestic relations courts by the *McCarty* decision demands a speedy response. I want to move ahead with the input of the Department of Defense. However, the problem is so serious that if that input is not forthcoming, I will have no choice but to move ahead without it.

Today's hearing will give us the opportunity to hear from three family law practitioners who will represent the American Bar Association on this issue. I would like to welcome Mr. Stanford Lerch, chairman of the family law section of the American Bar Association; Mr. Michael Barber; and Mr. Robert Arenstein.

Before we receive the testimony of these gentlemen, I would like to recognize my colleague, the distinguished Senator from New Mexico, Senator Domenici, for any comments he would like to make. Senator Domenici has introduced a bill similar in purpose to S. 1814. So I welcome him to this subcommittee today and I welcome his contribution today.

Senator Domenici, welcome.

STATEMENT OF HON. PETE V. DOMENICI, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator DOMENICI. Thank you very much, Mr. Chairman. I know you are very busy and the committee is, and I don't want to take a lot of your time.

Mr. Chairman, I will just take a few minutes to exchange some views with you and to talk specifically about some enforcement approaches.

Obviously, as is the case with an issue of this type that gets all the way to the U.S. Supreme Court, it is very controversial. I think frequently when you have issues as controversial as this we tend to make them too complicated.

It appears to me that there is no justification whatsoever for the Congress of the United States not to act in this regard. It is obviously our prerogative with reference to military pensions to decide whether or not they are to be treated differently than other property and property rights in this country.

Basically if you are in the State of New Mexico and you have acquired a property right and you go through the divorce courts, that property right is subject to the jurisdiction of that court, subject only to due process and some kinds of general premises that have to do with general equity in this country.

It doesn't seem right to this Senator that we will take our military and say you can have a spouse for 30 years who can raise your family, she can help you throughout all those trying times, but now when the time comes for you to get a divorce, if that occurs, and you and I know that that is not a happy moment but it does occur, that we would say the courts of this land somehow or another shouldn't have anything to do with determining the property rights in and to that pension. I for one think that is unfair.

I could share with you the cases that have come to me in my office in Albuquerque, N. Mex. One typical case—26 years of wedded life, still has 2 children at home, and the only serious asset that they have is a nice pension. The husband moves to Texas and says thank you for the 26 and you raise the kids. The divorce decree says he has got to split the assets with her. Not only can we not get jurisdiction, but now with this decision, what the Supreme Court has said is that is not a property right subject to the normal equities of our courts in this country.

Senator JEPSEN. In this case there were no assets except the pension?

Senator DOMENICI. There was an equity in a house. Very generously the decree said that should be split, too, because the court thought they would be splitting the pension. Now they will go in and get that modified, but this lady was, in my opinion, legitimately in tears and on the other side of the emotional scale she was legitimately angry at us, that we would make a decision or fail to act such that she will receive nothing while this man can get married again and have his $800 or $900 a month.

I don't pass judgment on fault in any of these. To me it is a deplorable situation when the marriage separates, especially after a number of children and a hard life. But I tend to think that the community property laws of this country, which are in my State and have been there since Spanish law, are about as fair as any.

They basically take the position that if a man and wife live together and the man works and the woman doesn't choose to work out of the home, she has contributed to his accumulation of assets by supporting him. We have a very interesting law. The presumption in that regard is that everything they own is 50–50.

Now that need not be the rule and it might not be the rule in Virginia, but I see no reason why we should not grant the courts of this

land the jurisdiction to make that type of a finding and then it is our responsibility to find a workable way to enforce it.

My bill is different in that it says if a court of competent jurisdiction enters that kind of a decree, it shall be the responsibility of the Secretary of Defense to comply with it in the division of the asset called the pension.

Now that may be overly simplisitic. I haven't studied the issue. You have great lawyers here in legal associations that will tell you of all the problems of conflict of laws that arise in the courts of this land in the enforcement of divorce decrees, and I understand all those. Are they entitled to full faith and credit, and how do you really know the last one is really the last one and what will we do with multiple divorces, all those are problems.

I think ultimately the decision has to be whether the Congress of the United States wants to make that pension the property right of the husband and the wife subject to the sovereign jurisdictions of the States of this land which have inherently built into them due process and have inherently built into them, subject to review, basic equity and fair play. I think we would be remiss if we didn't do that, Mr. Chairman.

I urge that this committee meet this responsibility and that in due course you will let the Senate of the United States vote on this issue. I think it deserves a vote on the floor.

Senator JEPSEN. Thank you, Senator.

Are there any questions that anyone has for the Senator?

[No response.]

Senator JEPSEN. Thank you very much, Senator.

Senator DOMENICI. You are welcome, Mr. Chairman. Thank you very much.

Senator JEPSEN. Senator Denton has an opening statement. Senator, if you wouldn't mind chairing until I return, Tony Principi will help you if you have any questions or need any assistance.

Senator DENTON. Thank you, Mr. Chairman, I will be happy to.

STATEMENT OF HON. JEREMIAH DENTON, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator DENTON. Mr. Chairman, ladies and gentlemen, I would hazard to guess that there are a few observers who have seen wives cast aside after those wives have loved and served ideally as service wives and often as mothers for many years.

I find it difficult to come to a final position on this legislation. I respectfully submit that for now I believe we shall be unable to act responsibly until the subcommittee has the benefit of the testimony of the appropriate senior officials of the Department of Defense. I would request, therefore, that we defer subcommittee markup until such time as these officials appear before us.

The implications of the Uniform Services Former Spouses Protection Act are indeed far reaching. It is all too true that inequities do indeed exist with respect to former military spouses. In my opinion, S. 1814 successfully addresses many of them.

The provisions for payment of court-ordered alimony and child support by the service secretaries and voluntary assignment of survivor benefits reflect changes that deserve this committee's support.

At the same time, there are provisions in S. 1814 that I must respectfully reserve judgment on. Some issues relating to any decision to overturn the Supreme Court ruling enunciated in *McCarty* v. *McCarty* give rise to questions of equity which are properly addressed to the Department of Defense.

There are a number of issues that I feel merit further considerations by this subcommittee, and some of them are addressed in a letter I have received from Col. Robert Stirm, U.S. Air Force, retired.

Colonel Stirm was a POW for 5½ years in Vietnam and his marriage was one of those which was not typified by the example I gave earlier in this testimony in that the shoe was on the other foot, as it were, and there were a number of cases like that.

While I realize that testimony from individuals was received during subcommittee consideration of this issue in September 1981, I feel strongly that Colonel Stirm's statement and similar experiences raise questions that must be considered and addressed if we are to forge an equitable legislative solution to the problem of protection for former military spouses, and I want to see the equitable legislation developed.

I ask unanimous consent that the statement by Col. Robert Stirm to which I have referred appear in the record at this point.

[The prepared statement by Col. Robert Stirm follows:]

STATEMENT OF COL. ROBERT L. STIRM, USAF, RETIRED

I entered the United States Air Force as an aviation cadet in 1953. Although I had resided in Colorado since 1951, I listed my parents address in California as my home of record since I had no permanent residence in Colorado (or any other state). After graduating from cadets as a 2nd Lt in 1953, I met and married a girl from Texas in 1955. During the next twelve (12) years, we had four children as we moved from assignment to assignment throughout the United States, Iceland, and Europe.

In early 1967, I was reassigned from Europe to Thailand, with temporary duty in Nevada for F-105 gunnery. While in Nevada, my wife and I considered the tour of duty as an F-105 pilot—which was 100 combat missions over North Viet Nam or one year, whichever came first. The F-105 loss rate was such that we considered the prospect that I could be lost as a battle casualty; therefore, to provide for some degree of security for my family should that occur, we decided to buy a house near my family in California rather than have her return to Texas or stay in Nevada—at that time we had no permanent roots anywhere. In the spring of 1967, as I left for Thailand, she was moved into our new home in California.

In the fall of 1967, I was shot down over North Viet Nam and taken prisoner. During my 5½ years of captivity, I was subjected to the torturous and inhumane treatment of my captors which ultimately resulted in numerous permanent disabilities or restrictive conditions. While in prison, I received very little mail and was afforded limited opportunity to write home; however, she was informed that I was alive and a POW in North Viet Nam.

Upon repatriation in 1973, I was greeted at Clark Air Base in the Philippine Islands with a "Dear John" letter from my wife. In this letter, she said that things had changed and it would be best to go our separate ways. I think that that was the most devastating news I have ever received. I told her that I loved her and our children and wanted to continue our marriage and build a new future. As anyone who has been subjected to harsh imprisonment and deprivation can attest to, only those with faith and trust in God, Country, fellow patriots, and family are sustained.

When I was returned to the United States, I was assigned to a USAF hospital in California closest to where my family was residing. Shortly thereafter, I was served with divorce papers and restraining order to prevent me from access to my home, my children, and all personal property. I was totally disillusioned and awstruck that after 6 years in honorable and dedicated service against an enemy of the United States that I would be treated that way in my "home". I asked the

court for reconciliation and counseling, all to no avail. As the time for the divorce trial drew closer, I was to learn just how much ". . . things had changed . . ." with her and the present realities of my "family situation."

The realities were that after about one year of my detention, my wife began a life of first, dating other men; then, having affairs with other men; and, finally, accepting no less than three proposals of marriage from different men—two of whom were attorneys she had contacted professionally. During the remainder of my imprisonment, she had callous disregard for our children. The then-current men in her life were given keys to the family home and car and the family home was used to entertain friends of my wife and her current boyfriend. She appeared frequently in public with her current man and was even brazen enough to pose with her boyfriend for a picture in the local paper society page. All of this pattern of conduct would indicate to persons of reasonable sensibilities that she had deserted the marriage. It would serve no further constructive purpose to recount all of the many sordid details that are part of several hundred pages of court documents other than to state that they all tend to corroborate the picture of an adulterous wife, living an elegant and fast-paced life with several different men, frequently travelling out-of-town with them financed by my USAF pay and allowances.

The divorce court, in rendering its judgment, found that the "date of separation" was April 1, 1970. In spite of this, the court directed that she did not have to repay any of my pay and allowances that she spent after the date of separation, and further that she was entitled to my accrued leave pay, monies paid to me under the War Claims Act for inhumane treatment, and my remaining pay—even though the California law stated that earnings and accumulations after date of separation were separate property. The court awarded her our home, our car, and 42.7 percent of my military retirement pay as I receive it—until either she or I die.

During much of the divorce trial, which lasted 13 months, I was forced to live in my brother's home because I was left with insufficient income after I paid the court-ordered child and spousal support, even as she carried on her affair with the attorney she later married.

Although our four children all stated that they wanted to live with me and not their mother, the court awarded custody of the two youngest to their mother. Subsequently, both of the younger children chose to leave their mother's home and live with me. Since the children have turned 18 and graduated from high school, I have provided essentially all support and resources for the childrens' higher education—their mother has not contributed significantly even though she was receiving 42.7 percent of my retired pay. When our oldest daughter was married last year, my former wife refused to contribute anything for the wedding—I provided the entire affair.

While the divorce took place under the jurisdiction of the California court system, I did not consider myself to be a resident of California. I had not resided there since 1950, as a minor child and two years prior to entering the Air Force. In fact, the California courts assumed jurisdiction because my wife chose this state and I had just been assigned to a USAF hospital in California and had no choice. During the trial, my former wife told me that she was going to move to Texas and sell our home, but she was advised by an attorney that she would get a better divorce settlement in California, including her half of my military retirement. Thus, I was a victim of being divorced in a state I was assigned to by military orders and a spouse who had "shopped" for the best state in which to divorce a military member.

Now California has long been characterizing military retirement pay as property and, erroneously as proved by the Supreme Court McCarty decision, awarding a portion up to 50 persent to the divorced spouse. Since the purpose of S 1814 is to permit the states to characterize military retirement pay as property and thus award a portion to an ex-spouse. If this were done, the United States Congress would grant approval to all States to render divorce judgments similar to what I have described above.

This, I believe to not be in the interest of the Nation, the Government, the Armed Services, members of the uniformed services, nor their dependents.

When I went through officer training in 1953, I was instructed in the existing retirement program and that I would be granted some protection by the Soldiers and Sailors Civil Relief Act. When I was serving my country in Viet Nam, no one in the federal or state government did anything to protect my civil and property rights as I had been taught. After I was repatriated and sought assistance from legal departments of DOD, USAF, or the state, I was politely told

"We'd like to help, but we can't get involved". My personal, civil, and property rights were severely abused but I had no constructive assistance nor advice.

Now that I am retired, I am restricted from some employment opportunities because of "dual compensation", conflict of interest, or physical impairment. Yet my former wife, enjoying the very best of health and wealth—both now and during the time that I was imprisoned—has no such restrictions yet she shares my military retirement pay without any restrictions on her employment, loyalty to the United States of America, compliance with the Uniform Code of Military Justice—till death do us part.

Indeed, if I had known that the United States Government was not going to keep their end of the agreement after 20 or more years of service, I might have thought more seriously when I turned down the opportunity to fly for the airlines in favor of honorable military service. I feel confident that airline pay and benefits are far more attractive than the prisoner camps and their long detention and deprivation, not to mention the physical abuse—only to be followed by a "lifelong" forfeiture of military retirement to an ex-spouse who could not live up to her marriage vows and needed to change to a lifestyle of much more elegance.

Since I retired in 1977, my former spouse has lived very comfortably in a house financed by my "Korean War GI Bill", which I became entitled to before I met her, with her husband (boyfriend since 1970), who, she has told me, makes in excess of $70,000 per year as an attorney—yet she continues to demand, and the California courts uphold, 42.7 percent of my retirement pay.

I, on the other hand, must try to make do on 57.3 percent of my retired pay, still be subject for recall for worldwide assignment, remain loyal to the United States and the UCMJ, observe the constraints of employment dealing with the Department of Defense and the United States Air Force, forfeit retirement pay (in part) if I obtain employment in the Federal Government—yet still pay her 42.7 percent of what I would have been entitled to—and, continue to suffer the results of almost 6 years in the "Hanoi Hilton".

Given the knowledge of what has occurred in my case and similar others, what choice do you gentlemen believe that members of the active military with special and critical skills would make, when, after 10 years service, are faced with a possible divorce in a State not of their choice, and are welcomed by an offer of favorable civilian employment—with attractive benefits and advancement possibilities—no prospect for death, imprisonment, or injury due to combat if they opt for the civilian job. The alternative—hang in there, serve honorably, pray that your wife is everything you thought she was when you married her, and if not, hope you don't end up being assigned in a State like California that may make a divorce judgment like mine—if S. 1814 passes, resign yourself to sharing your retirement pay with her until "death do you part".

Senator DENTON. I will ask Senator Cohen if he cares to act as the chairman since he is senior.

Senator COHEN. Without objection, so ordered.

Senator DENTON. All right, sir.

Senator COHEN [presiding]. Until Senator Jepsen returns let me just offer some comment that is of importance to me here this morning, in addition to the legislation we are discussing. I would like to take this opportunity to express my deep disappointment over the failure of the Defense Department to appear at this hearing this afternoon.

The Pentagon has had months to prepare its position. When the subcommittee last year held a hearing on the *McCarty* decision, our strong interest in receiving the Pentagon's viewpoints was made very clear to the Defense Department spokesmen who were testifying at that time. My understanding was that we were assured that those views would be forthcoming and provided to us in a timely fashion.

Well, a number of months have passed since last September, the hearing has been on schedule for some time and Defense Department officials have been given, in my judgment, more than enough time to come up with a unified position on this legislation. For me it is simply inexcusable that this committee is notified in less than 24 hours that the DOD is not going to appear and testify on this subject matter.

The problems that are caused for divorced spouses in the wake of the *McCarty* decision are serious ones and corrective legislation such as is being proposed here today is simply not going to wait indefinitely.

I think the chairman has done a great service in developing S. 1814 in working for equity for spouses and ex-spouses and has sought a full range of views and has taken them into account in putting the bill together. I think it is a good bill and I am proud to be a cosponsor.

I hope that the chairman will take it upon himself to make it clear that the Pentagon should come forward as soon as possible because we simply cannot wait forever on this legislation.

We are going to have our first panel of witnesses. I would like to welcome Mr. Stanford Lerch, who is chairman of the family law section of the ABA; Mr. Michael Barber and Mr. Robert Arenstein. Gentlemen, you may proceed with your testimony.

PANEL PRESENTATION ON BEHALF OF THE AMERICAN BAR ASSOCIATION: STANFORD LERCH, CHAIRMAN, SECTION OF FAMILY LAW; MICHAEL BARBER, COUNCIL MEMBER, SECTION OF FAMILY LAW; AND ROBERT ARENSTEIN, CHAIRMAN, COMMITTEE ON INTERSTATE AND FEDERAL SUPPORT LAWS AND PROCEDURES, SECTION OF FAMILY LAW

Mr. LERCH. Mr. Chairman and members of the subcommittee, we appreciate the opportunity to present this testimony to you on behalf of the American Bar Association.

I am Stanford E. Lerch, the chairman of the family law section of the American Bar Association. Robert D. Arenstein on my right is the chairman of the family law section's Committee on Interstate and Federal Support Laws and Procedures. Michael Barber on my left is a member of our council of the family law section of the American Bar Association and also works very deeply in this particular aspect of the law.

We are here at the request of the president of the American Bar Association, David R. Brink, to support enactment of Senate bill 1814. We also have certain suggestions for technical changes to the bill that will clarify its purpose and legal impact. Finally we hope to point out additional legal problems caused by the Supreme Court decision of *McCarty* v. *McCarty* and cases subsequent to *McCarty* which have been addressed to this committee as of yet, and we hope to do that today.

McCARTY V. McCARTY

Senate bill 1814 would recognize that States through their courts have the power to distribute community or equitable interests in military retirement or retainer pay. The bill would also require the Secretaries of the Armed Forces to recognize State court decrees of divorce, annulment or legal separation which recognize a spousal interest in and divide retired or retainer pay.

Until June 26, 1981, many States, and I may state nearly all States, recognized and awarded spousal interest in military retirement pay as community property and/or marital property of the parties. On June 26 the Supreme Court handed down a ruling in *McCarty* v. *McCarty* that took from the State courts their power in divorce actions

and dissolution actions to determine property rights in pension benefits where those benefits are derived from military service.

The Court decided that such pension benefits are solely the property of the military member, notwithstanding any State court decree to the contrary. In so doing the Court has materially and adversely impacted on the practice of family law in the United States. More specifically this decision has cast a shadow over untold thousands of final divorce and dissolution decrees in this country.

Recognizing this situation, in January 1982 the House of Delegates of the American Bar Association unanimously adopted the following resolution:

Resolved, That the American Bar Association calls upon Congress to enact legislation making all deferred compensation derived from federal employment, such as pensions, retired pay and other income of that nature, subject to state property law, except as specifically exempted by explicit federal legislation.

Prior to that resolution and *McCarty*, in August 1979 the House of Delegates of the American Bar Association adopted the following resolution:

Resolved, That the American Bar Association supports the enactment of legislation which basically requires the Secretaries of the Armed Forces to recognize state court decrees of divorce, annulment or legal separation which recognize spousal interest in retired or retainer pay.

As the result of those two resolutions, the ABA wholeheartedly supports the principles contained in Senate bill 1814.

However, Mr. Arenstein and Mr. Barber will offer certain suggestions as to proposed amendments which may, in our opinion, help the bill.

Senate bill 1814 does not deal with the substantive legal issues of whether or not the spouse should have an interest in military retired pay. The issue of entitlement is one which would be decided by the courts in various States and not pursuant to this bill.

As stated above, prior to *McCarty*, the courts in virtually all the community property States and in many of the marital property States had held that military retirement pay is a community or marital asset and is subject to division between the spouses. Some States have held to the contrary. That is primarily an issue of substantive law and this bill does not deal with that substantive legal issue.

The bill does not require any division of retired pay by a State court or even sanctions such division, nor does it prohibit it. The bill merely permits a State court to divide such pay and retires that to the extent that there is a valid State court decrees which divides such pay such decree will be recognized and honored and the pay distributed in accordance therewith, except for specific limitations set forth in S. 1814. Later we will discuss the advisability of certain of those limitations.

S. 1814 is very similar is Public Law 95–366, which is in 5 U.S.C. 8345, which requires the Civil Service Commission to distribute civil service retirement pay between spouses in accordance with valid State court judgments.

There should be little difference between the principles governing the treatment in the case of the spouse of a retired civil servant and a military retiree. We believe that our suggestions, if accepted, will accomplish that purpose.

Please note that the January 1982 resolution of the American Bar Association calls for action on all federally defined pension rights. We realize that such action may be beyond the scope of this bill and this subcommittee. However, we hope that committees which have jurisdiction to alter the legal trends set in motion by *McCarty* will take appropriate action.

In many cases *McCarty* has been seized upon by divorced military spouses to actively deprive their spouses of their very sustenance. This issue, retroactivity, is one major problem we will address. However, the prospective effect of *McCarty*, not only on family law but also the military family of the future is a second social as well as legal problem we hope to address.

Finally, we will bring to this subcommittee several areas of inconsistency with other areas of Federal law in the practice of law generally.

Mr. Barber will now present his portion of the statement.

Senator COHEN. Before you do, Mr. Barber, Mr. Lerch, I was not clear on two points. No. 1, you pointed out that this doesn't deal with the substantive issue of mandating how this will in fact be declared common property and so forth. What I am asking you is do you think that we should in fact mandate the substantive change, or is this legislation as currently drafted going to encourage forum shopping?

Mr. LERCH. We feel that this legislation as currently drafted with certain modifications that we will discuss will in fact be a good bill and we would support it. We feel that it is a procedural bill and not a substantive bill.

Senator COHEN. The other point is you mentioned the retroactivity of *McCarty*, that some servicemen are going back retroactively to take advantage and exploit the decision as such of the Supreme Court. What about the retroactivity of this particular legislation, do you recommend that we go forward only or should the legislation go back after a person has been divorced and apply retroactively?

Mr. LERCH. We feel that the issue of retroactivity should be addressed in the bill.

Senator COHEN. Which way?

Mr. LERCH. With the idea that the retroactivity issue will not cause any change in property rights. We would like to see that the fact that there has been a hiatus period will not affect the rights of any activities that have taken place in the interim period of time and that will be specifically by the bill.

Senator COHEN. Well, I guess what I am asking is you deplore the retroactive nature of the people who are taking advantage of *McCarty*.

Mr. LERCH. That is exactly correct.

Senator COHEN. You would like to see that decision be applied prospectively until such time as this legislation is passed, and you would like to see this in fact made prospective and not retroactive; is that not correct?

Mr. LERCH. That is correct.

Senator COHEN. Mr. Barber.

Mr. BARBER. Thank you, Mr. Chairman and members of the committee.

I am Michael Barber. I am a supervising deputy district attorney in Sacramento, Calif., with 15 years of experience in enforcing child support obligations. I am also a Reserve Naval officer with 20 years experience as either an Active or Reserve officer.

As a Reserve officer I have provided legal assistance to military personnel and their dependents. I want to underline one point. In presenting this testimony I represent neither of these governmental entities. My observations, however, for the purpose of testifying on this bill are shaped by my association with both of them.

The problem created by the *McCarty* decision for the family law practitioner for the courts and for public agencies are tremendous. The decision and its progeny *Ridgway*, which Mr. Arenstein will address, have left in jeopardy thousands of property settlements and divorce decrees now in effect throughout the country.

It has left in an uncertain state a large number of women who have passed the age when one can effectively enter the job market. Because of this decision, a potential burden has been placed on the courts to review and revise supposedly stable arrangements for support and property division that have now been clouded if not nullified.

The decision has the potential of exacerbating and inflamming personal relations and working associations where continuous contact between the divorced parties is necessary for the supervision of children of the union.

Finally, it has for the most part placed the burden of clarifying this issue on the person least able to afford the cost of litigation, the spouse of the military member or former member.

Having said all this, I do have some suggestions that I believe will improve the bill.

First, section 1408(a)(1) of the bill defining courts should be revised so that Federal courts under 42 U.S.C. 660 and the Bankruptcy Code are included therein. In fact, it is suggested that any court in which a settlement agreement has been entered as part of the court order might be included in that definition.

The definition of court order in 1408(a)(2) appears to exclude temporary support orders and orders pursuant to the reciprocal act. If, in fact, it is the intent of this bill to make this the preferred enforcement vehicle not only for community property interests or for equitable property interests but also for spousal and child support, then those orders ought to be included therein. You will otherwise, I think, see a continuing conflict between so-called 459 garnishments and this bill if that is not clarified.

Third, the concept of an order setting forth the amount of past due support as distinguished from a garnishment under 42 U.S.C. 659 is a novel concept. It approaches a Federal wage assignment. It is uncertain whether procedurally such an order is available in the 50 States. If it is in fact the intent of the committee to define the procedure under which garnishments and property divisions may be given effect, a process that has been previously defined under 42 U.S.C. 661 Act the Federal Government, then it is suggested that the bill or commentary thereto so state.

It is recommended that the property right in the divided retirement be more clearly distinguished from support obligations and process issued for the enforcement of support. It appears the purpose of the

statute is to augment existing support enforcement procedures by permitting a continuing garnishment for past due and current support. If so, it would be welcomed in many States where such process is now a legal thicket. However, this, too, should be clarified.

Fourth, section 1408(3) provides for a maximum limit not to exceed 50 percent of the disposable retired or retainer pay subject to court order or orders. We suggest that the following language be substituted for section 1408(3):

> The total amount of the disposable retired or retainer pay awarded as equitable or community property to a spouse of a member which is subject to court order or orders under this section shall not exceed 50 prcent of such pay.

We do this for the following reasons. This is based on our assumption that the subcommittee has decided that a nonmilitary spouse should not receive more than 50 percent of a military pension as a property right. As currently worded the legislation would not only restrict the spouse from receiving more than 50 percent as a property right but also from receiving more than 50 percent for support of minor children to the extent the spouse enforces the property right.

Senator COHEN. Would you say that again more slowly.

Mr. BARBER. Sure. The next paragraph following the proposed change in the written material submitted on behalf of the ABA gives an example of just what I am trying to point out. Under this bill, as we read the bill at least 50 percent of the retirement pay would go to the military member. The other 50 percent, however, would have to be made available not only to pay a community property interest in that retirement pay but also to support children, and if there were spousal support awarded for one reason or another, also to pay the spousal support. Thus, the community interest would be reduced in effect to pay the spousal support and child support.

Senator COHEN. What you are saying is that under the 50-percent limitation it would include the equivalent of alimony payment plus child support?

Mr. BARBER. It would include everything, yes, sir.

Senator COHEN. If you compare it with regular divorce proceeding?

Mr. BARBER. Under a regular divorce proceeding what is the spouse's property after the divorce has been completed is not going to be subject to another charge for support for the children of the marriage of which spouse has custody if in fact there is an order requiring the other spouse to also pay support.

Senator COHEN. OK. Read your next paragraph.

Mr. BARBER. A second example of what is wrong with the present wording relates to the priorities established under the statute. Because the statute makes support obligations a charge against the entire amount of retired or retainer pay it would be entirely possible with two or more marital property divisions to have the property of the spouse who is last to serve the secretary be entirely allocated to the support of the children of the first spouse.

The revision in language we have proposed would apply the support obligation against net property of the retired service member and not against the property rights of either spouse. If this seems too harsh to the service person, realize there are still protections in relation to that net pay under 15 U.S.C. 1673.

In addition, it is our collective experience that when judges award substantial property to a former spouse they consider the property award as a practical limitation in fixing spousal and child support obligations.

Fifth, 1408(d)(4) should be amended to provide that nothing in the section shall be construed to limit the power of any person to whom a support obligation is owed from recovering that obligation from other resources owned by the service member or former service member. There is an ambiguity in the bill that is referred to in my written remarks.

Sixth, it is our understanding that an amendment to 1408(d)(3) will be offered to block any order under 1408 while legal process under 42 U.S.C. 659 is still in effect. Such legal process could include a wage assignment which could be in effect for 18 years. I doubt seriously that it was the intent of the committee or the drafters of the bill to stay for such a long period of time the effect of the property distribution that is inherent in the bill.

Seventh, another proposed amendment creates a section 4 to the bill amending 42 U.S.C. 659 by preventing any collection thereunder from going to or through the hands of a spouse or former spouse. Apparently the purpose of this was to provide a limit on the amount that could be garnished to the benefit of such a former spouse to strengthen the 50-percent limitation. This seems unnecessary because the limitations under 15 U.S.C. 1673 provide sufficient protection.

Eighth, the section and comments thereon covering decrees that became final before *McCarty* is ambiguous as to the concept of in personam jurisdiction. It is my understanding that the doctrine of continuing jurisdiction that controls in divorce actions would also apply to motions to modify under this section. However, it is my suggestion that this be clarified or at least referred to in the committee comments.

I will now turn the microphone over to Mr. Arenstein who will discuss in much greater detail the very important issue of retroactivity.

Senator COHEN. Can I just go back to that one point you made earlier that I had so much difficulty understanding?

Mr. BARBER. Sure.

Senator COHEN. What you are saying is that if in fact this is to be a property right and there is to be a community like division that the court in fact can order that. What you are recommending is that we allow the court to say that they might in fact go against the spouse and say in addition to the property settlement you still may have the continuing obligation to support your children and your wife out of your 50 percent or your earnings or whatever?

Mr. BARBER. That is correct.

Senator COHEN. OK, that is clear.

Mr. ARENSTEIN. Mr. Chairman, I am Robert Arenstein. I am a member of the executive committee of the New York Sate Bar Association's Family Law Section. I chair the Interstate and Federal Support Laws and Procedures Committee of the Section of Family Law of the ABA. I have been an active family law practitioner for the last 10 years in both New York and New Jersey.

I am pleased to have the opportunity to discuss the problems which exist in the field today in marital law regarding *McCarty* and to discuss the merits of S. 1814.

I am going to go into two very important issues to us, one of retroactivity which you alluded to before, and the other a case which came down in November after your last hearing called *Ridgway* v. *Ridgway*, another Supreme Court case which is just as important as *McCarty* and has even more effect than *McCarty* did.

For States which have either equitable distribution or community property, both *McCarty* and *Ridgway* have upset the structure of property divisions where military personnel were involved.

One State that really bothers us in the ABA in our Family Law Section is that of Texas. Texas has no special support and in fact up until *McCarty* the only thing that could be garnished was the military pension or a pension. You can't garnish wages in Texas.

We have found through our members in the section in various surveys that many military members before retirement or upon retirement are relocating to Texas and Texas has been one of the major problems in family law regarding military personnel and military retirement.

Senator COHEN. I find a lot of people in the Northeast are relocating in Texas as well.

Mr. ARENSTEIN. The retirement benefit is usually the major benefit produced in the marriage of a family, with the exception of the marital home. Usually with the service personnel at least on the enlisted ranks it is rare that they own a home because they are usually on base housing and the major asset could be that of the pension.

One might be less concerned if the State court could make an award of community property or equitable distribution of other property if there was some to the spouse. I believe that Senator Domenici, when he testified before, talked about a spouse where there was a division of a home as well as a pension and he said they could go back and modify that decree.

Well, I have to disagree with him there because with regard to that the Supreme Court came down with a case, *Hisquierdo* v. *Hisquierdo*, and in that case they ruled that a railroad retirement, which was similar to the military retirement statute enacted, it was not permissible for any court to consider that in the distribution of property because Congress had preempted it. So what happened then was that they had to exclude that from their consideration and just look at the family home.

So a court today who would look at that case would look at the family home and divide it in half or however it was divided, which is the way he had testified before, and not be able to give any consideration to the pension whatsoever, or that decision could have been reversed.

Now we have found that many decisions have reached the courts now on retroactivity. We are conducting surveys of what is going on with *McCarty* retroactive cases, and there are four right now that we know of that have addressed the issue on appeal and probably will end up in our Supreme Court of the United States because in *McCarty* they didn't address retroactivity at all. They left it silent and that has been a very big problem.

Now three of the four cases, two are in Texas and two are in California and they are in the written testimony and I really won't go into the actual substance, ruled that preexisting State orders prior to the date of *McCarty*, June 26, 1981, would be enforced and *McCarty* would

not apply to them if they did not raise the issue of Federal preemption on appeal at that time. So at least there they are enforcing those State court decrees.

In Texas, though, there was a case in ex parte Buchanan. What the State courts generally do when it comes to a pension is they award the pension if and when received. Now this is important because everybody has raised issues of vested and nonvested which I am sure you may want to get into later on.

If a court decree says if and when received, and then the pension comes down and it is divided. What happened here was they ruled that that entire order was void because of *McCarty* and the military ex-spouse was not entitled to any pension benefits.

The other cases have ruled retroactivity would not apply to *McCarty* and basically the trend right now is that they are not enforcing retroactivity prior to June 26. There does remain a problem with the spouse who is divorced from June 26 to the date your committee enacts legislation because those people are going to be left out in the cold.

We urge you to amend S. 1814 to make it retroactive. This would create uniformity and signal to the Supreme Court that prior decisions should be enforced to the extent which the law allows.

When Public Law 95–366 concerning civil service retirement benefits was enacted, it was made applicable to preexisting court orders. I think that if you had a specific statement in your bill making it applicable to preexisting court orders at least prior to *McCarty* you will have some sort of a continuity and predictability of enforcement of State court judgments.

Now the bill leaves out one very important point in its definition when you go into courts. It leaves out the area of legal property settlements.

Senator COHEN. I am sorry to interrupt you at this time. I am going to have to catch a vote on final passage of an emergency supplemental, and rather than disrupt the hearing I would ask the chief counsel to continue to conduct the hearing until we get back.

Why don't you continue.

Mr. ARENSTEIN. The bill in addressing courts leaves out one very important area, and that is of legal property settlement agreements negotiated by the parties prior to a divorce. Basically it doesn't go into any type of a property settlement that is not confirmed by a court decree that is not in a court of a sister State. It leaves out Federal courts and it leaves out foreign courts.

A good example of the problems with enforcing the agreements was decided in November 1981 when the Supreme Court decided of *Ridgway* v. *Ridgway*. This case removed from the State divorce courts jurisdiction to consider another federally created benefit. The decision overturned a ruling by the Supreme Judicial Court of Maine, which was I believe Senator Cohen's home State, that the three children of a divorced Army sergeant were entitled to proceeds of a $20,000 SGLI policy when he died a year after the divorce.

As part of the divorce decree and the property settlement which was negotiated by both sides, the sergeant, Richard H. Ridgeway, explicitly agreed to keep his life insurance in force for the benefit of the party's three children. But he remarried 4 months after the divorce and 6 days after the remarriage made his new wife the beneficiary.

He did this by saying I designate by law my beneficiary, and by law, was in order of succession and the spouse came first.

When he died 5 months later, both the second wife and the first wife, who acted on behalf of the children, claimed the benefits. Well, the Supreme Court in their infinite wisdom decided that the second wife was entitled to the insurance. I believe in that case Justice Blackmun made a statement similar to what the chairman, Senator Jepsen, quoted in his opening remarks. He said:

> A result of this kind of course may be avoided if Congress chooses to avoid it. It is within Congress' power. Thus far, however, Congress has insulated the proceeds of SGLI insurance from attach or seisure by any claimant other than the beneficiary designated by the insured or the one first in line under the statutory order of preference. That is Congress' choice. It remains effective until legislation providing otherwise is enacted.

I think that Justice Blackmun has urged Congres twice through this committee to pass legislation to change the effects of *McCarty*.

We as family law practitioners go a step further. We are concerned that *McCarty* and *Ridgway*, which was this latest Supreme Court decision, can easily be extended to the private pension area. Due to the fact that military personnel are now authorized to open individual retirement accounts called IRA's, this may be of importance to this subcommittee. There is great concern that private pensions may eventually be affected by *McCarty* by virtue of the Federal preemption doctrine.

Now we believe that S. 1814 is a bill which begins to address some of the problems which have been created as a result of *McCarty* and we suggest that S. 1814 be enacted to allow predictability and fairness of the consideration by the State courts.

This legislation officially recognizes a military wife's contribution when a marriage of long duration is terminated. Military spouses give up a great deal on behalf of their spouse's careers and while they are not in the military themselves they are an integral part of the service. The concept of marriage as an economic partnership is a critical issue here.

If Congress does not reaffirm the jurisdiction of the State courts to view military pensions as a property right and give these courts enforcement powers, military spouses will not be given a fair share of this partnership. Basically, both in community property and equitable distribution States, we are now treating marriage as a partnership and there is no reason to have a differentiation between a civilian wife and husband and a military wife and husband with regard to an economic partnership.

In conclusion, legislation of this nature is urgently needed.

We thank the chairman and this subcommittee for permitting us to present our views.

Mr. PRINCIPI [presiding]. Thank you, gentlemen. I am sure the chairman would thank you for your testimony.

I have a few questions that I will ask prior to the members returning. However, before doing so, I would like to make one correction for the record.

In your testimony you state:

> The reasoning is based upon our assumption that the subcommittee has decided that a non-military spouse should not receive more than 50 percent of a military pension as a property right.

The subcommittee has not decided that issue. The chairman of the subcommittee introduced a bill and certainly the 50-percent limitation reflects his views as opposed to the subcommittee's.

Let me ask counsel for the minority if he would like to proceed with any questions.

Mr. BESOZZI. I would prefer to wait and see if Senator Exon gets here, but go ahead, Tony, if you have some questions to ask on behalf of the chairman. I think Senator Exon should be back after this vote.

Mr. PRINCIPI. Gentlemen, could you briefly describe the situation in State domestic relation courts today and the impact on ex-spouses since the *McCarty* decision?

Mr. ARENSTEIN. Well, I think I gave you some impact in my testimony, but I will go further. What is happening now in the consideration from June 26 on is that the State courts are barred by the ruling of *McCarty* and *Ridgway* from including either life insurance, SGLI, or military pensions in a property award by a divorce court.

The only thing they can consider is the rest of the assets of the partnership of the marriage. If there is a house that can be considered. If there is spousal support allowed to be awarded in most of the States, except Texas, that can be done if it is a community property or equitable distribution State.

We do have a few title States which would not allow them to distribute property other than to whose property the title was in. So the military spouse is left to divide whatever is a part of the assets of the marriage other than the military pension or insurance.

Mr. PRINCIPI. Mr. Lerch or Mr. Barber, do you have any further comments?

Mr. BARBER. Just a practical observation as a member of the State family law section and a member of the family law section of our country bar. *McCarty* has left a great deal of uncertainty in the minds of counsel who are attempting to assist people in working through the difficult situation involving a divorce, such problems as the continuing character of separate property may arise, the situation being one where a pension benefit is used to secure some type of other property in the name solely of the military pensioner. The question then arises does that continue the character of the pension as the separate property of the pensioner? It is not clear what advice right now should be given on that one way or another. That is an issue, by the way, that will be cited in the soon to be published Texas Law Review article.

There is the question about advice to an individual as to whether or not that individual ought to continue to pay the other spouse a community or equitable share of the pension, because if in fact the military spouse does not owe those pension benefits, even though it was a preexisting order, then the advice may be wrong. There is then question whether or not the attorney may be held liable for having advised payment of those benefits if they are nonrecoverable from the receiving ex-spouse.

Mr. PRINCIPI. Mr. Barber, I would like to ask a question concerning nonmilitary retirement income, retirement pay, if you will. Assume a nonmilitary spouse has earned a future interest in a private sector retirement plan or a civil service retirement plan. Is the future interest

in such a plan considered as community property or marital property indivisible upon divorce since *McCarty*?

Mr. BARBER. Yes; in States that would have considered it as such before *McCarty*.

Mr. PRINCIPI. Let's take California, for example.

Mr. BARBER. Yes; in California.

Mr. PRINCIPI. Now, as a result of the *McCarty* decision the nonmilitary ex-spouse would not be entitled to receive a share of the military retirement pay; is that correct?

Mr. BARBER. Under *McCarty* that is correct.

Mr. PRINCIPI. Would this be true even if the military retiree receives a portion of his spouse's interest in her or his retirement pay?

Mr. BARBER. In the nonmilitarily derived retirement pay?

Mr. PRINCIPI. Yes.

Mr. BARBER. Yes; that would be true. In other words, what I believe you are saying, Mr. Principi, is that a civilian pension may be considered community property under these circumstances but a military pension may not. Thus, a civilian pension or a future interest therein may be divided as community property under states which otherwise permit nonvested pension rights to be divided, but the military noninvested pension right would not be divided. Do I understand the thrust of your question?

Mr. PRINCIPI. Yes, that is correct. Has that occurred in your experience in California since the *McCarty* decision?

Mr. BARBER. Well, I haven't had any personal observations of an event like that, but again we have got an awful lot of courts out there and they have been pushing divorces through.

Mr. PRINCIPI. Assume you had a couple married for 30 years, 20 years of which were spent on active duty and 10 years the service member was retired. During that 10-year period for whatever reasons the retiree elected to place his retired pay in a separate account in his name only and they live off of other joint earnings during that period of time. At a 30-year point a divorcee ensues. How will the courts deem that separate bank account?

Mr. BARBER. It is my understanding they would define it as separate property.

Mr. PRINCIPI. She would not be entitled or the nonmilitary spouse would not be entitled to any of that bank account?

Mr. BARBER. That is my understanding.

Mr. ARENSTEIN. That would be the same, by the way, in an equitable distribution State. If it was considered separate property by the courts now, which it is with regard to *McCarty*, then any appreciation in the case or anything that did not accrue as a result of the spouse's help would not be considered her property at all.

Mr. LERCH. Mr. Principi, I can foresee an example where you would have the military member having let's assume 20 years in the 30 years and having a pension and during this period of time the other spouse had also worked in an area where she or he had acquired a pension. I can see the situation where the military member will have his or her pension declared to be separate property and untouchable, whereas that same military member will get half of the private pension that was put together by the other spouse.

Senator JEPSEN. Mr. Barber, as the district attorney in community property in your state for more than 15 years, and as a naval officer in both an active and reserve status for 20 years, could you render an opinion on whether S. 1814 would adversely affect the personnel management needs of the services? Hopefully DOD will provide us with their opinion in the near future, but would you comment on it now.

Mr. BARBER. I first want to underline of course that this is a personal opinion. It is derived from the experience though that you have referred to, Mr. Chairman. In my opinion, if anything, in those situations where there may be some concern on the part of a military spouse about continuing the career because of some temporary adverse situation in the family, S. 1814 probably would promote rather than impair retention.

One can envision the hypothetical situation where in a military community there is a divorce, a sudden dissolution involving a marriage of long standing in that community, and the other spouses in the community suddenly becoming cognizant of the fact that the military wife in the cause celebre is left without any pension benefits.

I doubt if any spouse is ever going to say that she has induced her husband to leave the military because of a lack of pension benefits that may be secured at divorce, but at that point the long separations, the problems of management of the children during those long separations, the uncertainty, the constant moves and so forth, maybe indeed be so overwhelming that with this further touch of uncertainty introduced into the situation the civilian spouse may lose any affection for or desire for affiliation with the military whatsoever and in fact induce the husband to leave the military.

Senator JEPSEN. Prior to the *McCarty* decision community property equitable distribution States were dividing military retired pay in accordance with State law. For approximately how many years did this situation exist?

Mr. BARBER. A key case in California on this cites appellate cases going back to the 1940's. I cannot really speak to any other jurisdiction, but certainly it has been a fixed principle of California law through the Supreme Court.

Senator JEPSEN. For a long time.

Mr. BARBER. Yes.

Senator JEPSEN. In retrospect, and again based upon your experience as the district attorney and a military legal assistance officer, did the division of military retired pay in California create any force management problems?

Mr. BARBER. Except insofar as there were problems involving collection because there was no clear recognition of these decrees at the service secretary level, I would say no. There were problems of course of indebtedness when community awards were not observed. Of course part of that problem was tied in with the child support area that was cured in 41 U.S.C. 659. Except insofar as you have the problem of enforcement, no, and this bill would certainly take care of that problem.

Senator JEPSEN. Well, statistics indicate that the vast majority of divorce occurs at the 5- or 6-year point. Do you agree, and if so, how is military retired pay apportioned between the spouses in community property States?

Mr. BARBER. First of all, the property right that we are talking about would be relatively limited under those circumstances.

Second, most family law practitioners recommend, in view of the apparent or implied antagonism involved, that the parties sever the partnership. Consequently there quite probably would be a buy-out or a tradeoff of that relatively limited property right at that time.

Stan, do you have any observations in Arizona?

Mr. LERCH. Well, I would say that Arizona law is very close to California in that they are both community property States and a good number of California decisions are cited in the Arizona courts reaching its decisions. I feel that Mr. Barber's statements would apply generally to Arizona as well and I think to most community property States and most equitable distribution States.

We have found, as Mike has alluded to, that when there is a short marriage, such as 5, 6, or 7 years, the intangible benefits from the retirement plan which may be 14, 15, or 16 years down the road are such that usually the parties will negotiate a settlement or a buy-out for a relatively small sum of money so that the uncertainty will be there. Usually the serviceman or woman in that short a period of time as far as the marriage goes will end up with the pension.

Senator JEPSEN. Well, for the record I would like to read very quickly a letter sent by Representative Vic Fazio, of the Fourth District of California, and then, Senator Exon, we will go directly to you.

I read this letter as follows:

DEAR SENATOR JEPSEN. I would like to take this opportunity to commend you on the excellent work that you have been doing to correct the deplorable inequity with regard to the lack of entitlement pension benefits for divorced spouses of retired military personnel.

As a co-sponsor of Congressman Whitehurst's bill H.R. 4902, the companion bill to your legislation, S. 1814 you may be assured of my strong support for your efforts.

On November 5th, 1981, I testified with Representatives Schroeder, Whitehurst and Hance before the Subcommittee on Military Personnel and Compensation of the House Armed Services Committee on the crucial need for legislative action to remedy the inequities which currently exist. At that hearing a number of legislative options were discussed.

It is my understanding that the hearings you will be conducting this week specifically focus on your legislation which embodies many of the proposals put forth by my colleague in the House. It is most encouraging that you are proceeding in this matter and that you are bringing in representatives of the American Bar Association to discuss the provisions of your legislation. As individuals who have had practical experience in the division of property in divorce cases they are most qualified to address the issue at hand.

One of these individuals is Michael Barber. As an Assistant District Attorney in Sacramento, California, he has been deeply involved in efforts to obtain child support from absentee parents in order to reduce the number of individuals on the welfare rolls. He can provide a unique perspective on the need for legislative action with regard to the division of pension benefits for many former spouses of military retirees are forced to rely on government assistance due to a lack of income from pensions. Mr. Barber's work in this area has deservedly received national attention and I am sure you will find his comments most valuable.

As a Representative for the Fourth Congressional District of California I have many constituents who have been directly affected by the lack of legislative action in this matter. Many of these individuals have contacted me personally or by correspondence. I have, therefore, enclosed a statement that describes some of these situations and it presents a very real and poignant case for change.

Again, Senator Jepsen, I commend your efforts and I remain hopeful that the actions we in Congress will take will once and for all eliminate the present inequities.

I would ask that the statement that Mr. Fazio had be made a matter of record.

[The prepared statement of Representative Fazio follows:]

PREPARED STATEMENT OF HON. VIC FAZIO

Senator Jepsen, Members of the Subcommittee, I commend you for your efforts to bring to the forefront a matter of great concern. At present, a deplorable inequity exists with regard to the entitlement of pension benefits for divorced spouses of retired service personnel. The only remedy to the current dilemma is legislative action; therefore it is incumbent upon each of us as Members of Congress to find a viable solution.

The passage of this legislation has become a matter of great urgency, for on June 26, 1981, the United States Supreme Court overruled a California Court of Appeals by declaring that federal law precluded a state from dividing military retired pay. This ruling has thrown state domestic courts into chaos since it deprived states of a tool to provide economic protection to divorced military spouses. In those states such as my home state of California that divide property in lieu of child support or alimony, this decision has been devastating.

The Supreme Court did not, however, deny the right of an ex-spouse to retirement benefits, it merely concluded that responsibility for making changes in the military retirement law lay with the Congress and not with the courts.

Every one of us has no doubt heard from at least one individual who, after being married to a career serviceman for twenty or thirty years, suddenly finds herself a victim of divorce without the right to any pension benefits and without the skills needed to enter the job market.

I would just like to quote from a few letters that I have received from my constituents, for I feel that their personal experiences best portray the plight of these individuals.

A woman from Vacaville, California wrote, "My ex-husband was away on three isolated tours of duty while I was home raising and caring for the children and maintaining the home. I never had worked before because he was an officer and our needs were taken care of, therefore I had no training to hold a job." She continues, "After being a dependent for thirty years and having been retired some three years, our marriage ended in divorce. The day after it was final, he left the country and was reunited with a woman he had met on his last tour of duty. Within a year they were married."

This individual goes on to say, "When we were divorced, we both agreed on a very meager amount of money for me each month, with no cost of living increase. I had no training for a job that would pay barely more than minimum wage, I had no medical benefits, no survivors benefits, etc. The security that I had worked and sacrificed for—thirty years of service as a military wife—is now going to the new wife, and I'm left with nothing."

Another constituent of mine wrote to say the following: "I cannot feel that my 17 years as an Air Force wife was not a joint contract. I supported him and his career, raised our family, and was unable to continue or advance in my own field. I never dreamed some years later I would be told that this had no value. Retirement was the goal of us both."

These are not isolated incidents. These situations occur over and over to thousands of women each year. These ex-wives of retired servicemen spent their married lives moving every two or three years to different parts of the world in support of their husband's career. They were unable to pursue their own careers or education. They were left with almost total responsibility for rearing their families and maintaining their homes. They along with their husbands sacrificed monetary reward in expectation of retirement benefits.

No one can deny that these women gave up a great deal on behalf of their husbands' careers. While they were not officially in the military, they were certainly an integral part of the service. To continue to deny to them that which they have indeed worked for is a travesty.

Today, you are considering legislation introduced by Senator Jepsen, S. 1814. As a cosponsor of the companion bill, H.R. 4902 introduced by Congressman Whitehurst, it is evident that I support the basic premise embodied in this proposal.

I feel confident that from the testimony you will hear and the statements that have been submitted, you will be in a excellent position to fully assess the needs which exist and the best means of accomplishing our common goals.

I commend you for your ongoing efforts and hard work on this issue. We must correct the existing inequities in a careful but timely manner.

Senator JEPSEN. I also would advise that Senator Cohen has co-sponsored S. 1814.

Senator Exon, you may proceed.

Senator EXON. Mr. Chairman, thank you very much. I am sorry this has been one of those days where I am supposed to be in six different places at the same time, and I apologize. This is a very important matter for the subcommittee.

I would just say as one member of the committee, and I suspect that I probably speak for a substantial number of the members of this committee, that we haven't made up our minds for sure in which direction we should go on this very important matter. I for the life of me can't understand why after all these years we are down to this rather late date in making some changes in this area, and I for one feel that some changes are necessary, but I recognize that there are lots of different and very interesting points of view on how we should proceed.

Just let me say to you I don't believe that there is a general thorough consensus on the committee yet. I think that here are many good parts of the chairman's bill that I can support, but I have made no decision because I am attempting as best I can to review the other proposals before this subcommittee.

Gentlemen, what I perhaps would like to get is one of you, if you agree, or all three of you to respond as best you can to this question.

As you know, there are a number of bills that are pending before our subcommittee which are designed to solve the *McCarty* problem in various ways. I am sure you know that Senator DeConcini has a bill which would simply wipe out that *McCarty* decision. Senator Domenici would go somewhat further than that. Senator Hatfield has modeled his bill after the Foreign Service officer legislation, that you are familiar with. And of course there is Senator Jepsen's bill which we have essentially been discussing here today.

Let me put it to you this way. If you had your choice from your perspective from all of the bills which would you feel would be the fairest measure to enact into law?

Mr. ARENSTEIN. Senator, we have discussed that in our committee in the ABA. We get copies of the bills that come down as they are submitted. We, in our resolution that was approved by the American Bar Association, plainly stated that we want legislation which puts the law back into the State courts to decide basically what the law was at the time.

Senator DeConcini's and Senator Domenici's bill do that, but they leave one thing out that I think Senator Jepsen's bill addresses, and that is enforcement. You have got teeth in enforcement in Senator Jepsen's bill which I don't think you have in Senator DeConcini's bill. His bill addresses the fact that it would make the State law apply to issue of military pensions.

I think you need the enforcement powers as well because if the military member goes off to Haiti or someplace else and lives you are going to have trouble getting jurisdiction over him to garnish that pension or to get that pension and I think that enforcement is very important.

I believe the three of us and the ABA right now, we haven't taken a position on any one of the three bills. But if you ask me my personal position, I think that Senator Jepsen's bill with modification would be the one that I would support because of the enforcement. I have a

problem with the 50-percent provision which we alluded to here today, and if we could work something like that out, out of the bill, or work some sort of a compromise.

The 5-year rule that is in the bill as it sits does not bother me because it is minuscule really. The State boards in considering pension rights would not give very much credence to a 5-year marriage of a 5-year service pension that is not vested. In fact, it would be minimal if they took the dollar and cents value of it.

So basically I would go with Senator Jepsen's bill. I would go with any one of the three of them. We like all three bills and we support them.

Mr. BARBER. Let me point out something in the enforcement area. I had an occasion to lecture on behalf of the American Bar Association several years ago in Texas at an institute down there. Without spousal support in Texas, and it is not part of Texas law, the only way in which this problem can be addressed, that is the spouse who in effect has been off the job market for such an extended period of time that they can't themselves be rehabilitated by spousal support the way they can in some other jurisdictions get adequate support, is through an award of community property.

In Texas, because of the limitations of 42 U.S.C. 659. it has been extremely difficult, if not impossible, to enforce such awards where the military member has left the effective jurisdiction of the Texas courts. Thus, the enforcement problem in terms of enforcing the property interest as incorporated in Senator Jepsen's bill is vital to give any substantial effect to such court orders.

Senator EXON. Would you care to add to that?

Mr. LERCH. Well, Senator Exon. Senator DeConcini and I are rather close personal friends so I do like his bill.

Senator EXON. But?

Mr. LERCH. But I do feel that it does not address the issue of enforcement and we feel that that is critical. We feel that whatever bill should come out, whether it be a DeConcini version or a Senator Jepsen version, it should have enforcement provisions.

Senator EXON. All right. I assume that the statements you have just made are not in the position of the American Bar Association that you are representing here today but your personal opinions as well?

Mr. LERCH. Yes, sir.

Senator EXON. Let me phrase the question a little bit differently. I suspect that there is general agreement that the enforcement provisions are obviously necessary if we are going to have anything, regardless of what we come out with. I cannot read the minds of the others that introduced legislation whether they overlooked that or didn't get it in and it should be in there.

Let me phrase it another way. Assume the other bills that I mentioned had the enforcement provision that is in Senator Jepsen's bill. Would there be a choice among the three of you other than that, because from the answers you just gave me I took it that you thought that the strongest portion of the Jepsen bill against the others was the enforcement provision. Am I assuming correctly?

Mr. ARENSTEIN. I would say yes. The Jepsen bill has a lot of tangential issues in it other than having State law apply and it addresses other areas which we really have not addressed to this committee today.

We have been focusing on, and the position of the bar association is, to put the decisions on property division into the State courts. I think it is clearly stated both in Senator DeConcini's and Senator Domenici's bill. I think it is clearly stated in Senator Jepsen's bill also. But we do have a problem with some of the limitations and restrictions in Senator Jepsen's bill.

The only other point that I can add is the longer that this subcommittee delays, the longer you are going to have a class of people from the day *McCarty* was decided until you pass legislation that cannot be helped. There is no way that you are going to get retroactivity to those people. That is a property right now that the Supreme Court has ruled final. You can go back and maybe help the people out pre-*McCarty*, but you are going to create a class of citizens, ex-spouses, that will not be able to be helped.

Senator EXON. Well, I think we understand that and I think you have made an excellent point. Again, though, I don't think my question was answered.

In your judgment, either as representing the bar association or in your personal judgment, if we had the enforcement provision in any of the other bills before us which of the bills would you think would be most equitable?

Mr. BARBER. Well, the one most consistent with the position of the American Bar Association would be that bill, and I believe this is also true of the DeConcini bill, in that they would place the jurisdiction over this property back in the State courts in this area.

It should be pointed out that the modification provisions of the Jepsen bill to bring preexisting orders under proposed section 1408 might also be considered and/or be helpful in this regard in terms of avoiding the constitutional issue that Bob Arenstein raised.

Stan, do you have any comments on that?

Mr. MARCH. Well, I cited previously the resolutions that have been passed by the house of delegates of the American Bar Association in 1982 and in 1979, one of which went to the effect of the *McCarty* problem, and the other went to the enforcement by the secretaries. We feel that the *McCarty* problem and enforcement were addressed in Senator Jepsen's bill. We feel that *McCarty* had been handled in the other bills.

I think, though, that in reading the resolutions passed by the house of delegates of the American Bar Association that a bill putting the decisions back in the State courts such as either the DeConcini or Domenici approach would be more in the spirit of what was intended by the house of delegates, although I think that Senator Jepsen's bill would also fall within that spirit.

Senator EXON. Let's go into this matter. I am not a lawyer, so I am not sure that I understand all these legal points.

Senator COHEN. I am and I don't.

Senator EXON. We are all in the same boat. There was a statement made that we can't do anything about the *McCarty* decision and we could be dividing people into different groups. Would it not be possible to write legislation that would be retroactive and that would eliminate that division that you alluded to?

Mr. ARENSTEIN. Yes, Senator. I addressed that in my comments. Basically the Civil Service Retirement Act, Public Law 95–366, had

a retroactive provision to enforce preexisting State court orders. I think that is working right now, and I am not sure if there has been a constitutional test on it, but I think that if you address that in one of the three bills suggested, that that would help the class of people that are affected by *McCarty* prior to the *McCarty* decision.

The Supreme Court when they decided McCarty didn't allude to retroactivity which leaves the door open I think, for Congress to show their intention. Basically Justice Blackmun in his decision of *McCarty* and in *Ridgway*, the other case we stated, has invited Congress to close up the loophole that was created by both decision, the *McCarty* and the *Ridgway* decision, which was giving SGLI insurance directly to the service member and excluding his ex-spouse or children entirely if so wanted.

Senator EXON. I understood you to say earlier that that couldn't be corrected. Am I interpreting you right in saying that none of the bills presently before us correct that, but it could be addressed?

Mr. ARENSTEIN. We read the Jepsen bill as possibly addressing it ambiguously. We think the language, and we suggest in our written testimony, could be cleaned up to state that it would apply to pre-existing State court orders and we think that that would help.

As far as the other area, the post-*McCarty* decisions from June 26 to the date of enactment, and if there is a delay in the bill, the delay that the bill takes, in my personal experience, I don't know how you are going to help those class of people.

Now they can go in for a modification, and it is suggested in the comments to the Jepsen bill, but as far as modification of State court decrees is concerned, each State has rules for modification and if you don't fit into the State court rules, and some of the rules need a change of circumstance and not just because a decision of Congress came down, but need a change of circumstances, financial ability, sickness or something like that. If you don't have that and you go into some of the State courts they are not going to allow a modification of a court decision.

So what is going to happen to that class of people, I see a problem there.

Senator EXON. Thank you.

I have no further questions, but minority counsel may have some questions of a technical nature to pose a little bit later on.

Senator Cohen.

Senator COHEN. I would just like to go over a couple more areas as we go through this. What about the medical benefits provision, do you think that 20-year marriage requirement for eligibility is appropriate?

Mr. BARBER. Senator, do I personally think it is appropriate?

Senator COHEN. You have indicated the 5-year you have no difficulty with as far as vesting is concerned and now we are talking about a 20-year requirement as far as medical benefits are concerned.

Mr. BARBER. If in fact we are talking about a property right in the form of medical benefits and one that could not otherwise be met through the divorce courts through purchase of medical insurance and an outside expenditure by the family, then I would be somewhat concerned that the medical benefit aspect of the bill does not parallel

other property rights identified by the bill and therefore would be inadequate.

I am not sure, though, that in addressing the issue of medical insurance and medical care, which may be considered support rather than a property right, the courts might not otherwise be able to meet that problem. It should be made clear that in no way am I diminishing the need for such medical benefits in the case of a spouse who is going through a divorce and has been married for 20, 30 or more years.

We have tried to underline the urgency of this bill because of the class of people who now fall in this limbo status of post-*McCarty*. If in fact the medical benefit problem would hold up passage of that bill, that would create indeed a difficult problem, more problems than would be solved by trying to work out something on the medical benefit.

Senator COHEN. Well, from the statistics that I look at it seems that the years married works out to about 26. Does that sound right to you? In other words, you talk about the majority of people who have long service in the marriage as such as well as in the service itself.

Mr. BARBER. Yes.

Senator COHEN. The difficulty I think this whole problem revolves around is that we have a problem generally with women who are divorced in the mid-life crisis situation where they don't have job skills and they have very grave difficulties getting back into the job market. That affects a lot of people, but I think it is even much more acute when you talk about people who are in the service.

I think it is particularly difficult because you have got in effect a nomadic existence which many other wives do not have to confront, and when you are a nomad in effect, and let's face it and I am not being facetious about it, people in the service are required to move from place to place and the families pick up their roots, the wives have to go with them, they settle down, they are there for a year or 2 years and they are gone again. That doesn't exactly lend stability to a potential employer who is looking for someone who is a good credit risk or a job applicant. You have a very nomadic existence and that contributes I think to the difficulty.

So you have people who have been married 20 years, they may be 46, 47, or 48 and it might be difficult for them to get medical insurance at that time if they are suddenly cut off.

I know it is easy to play to a packed audience. We have a number of women who are in this audience, a number of wives or former wives, I assume, and I can tell from looking at some of the men who are here, I suspect that they represent some of the services or some of the organizations who represent services, and I would say the same thing to a male organization or a male audience as I will say right now.

When I used to practice law and we went through the teaching at law school we found that under common law the husband and the wife were one and the husband was the one, and that a woman, once she became married lost all separate legal identity. She lost the right to vote separately, if she even had the right to vote. She had no right to make a contract in her own name. She had no right to own property in her own name. So she had in effect no legal status separate and apart from her husband.

Well, we have come a long way, to quote from the Virginia Slims ad, since those days and have a long way to go still. But the fact is that a military wife is still in a somewhat different capacity. Even though she has a separate existence, nonetheless, her existence in large part is dictated not only in terms of where she has to go, but what she in fact has to do. So she is tied very closely to her husband's occupation or profession as much as a professional soldier.

I think that for any men who think that we are proceeding down the wrong path and that we are rushing to some sort of inequity as far as they are concerned should take into account how the Army, in fact, evaluates their own careers.

I have a copy of some of the excerpts from an Army officer evaluation report which points out that this particular individual has performed in an outstanding manner, and it goes on and on to praise what wonderful qualities he has.

Then the officer says:

But I just criticize his wife's antisocial actions which led to the disintegration of a group of wives who had been making significant contributions to the company and military community. I therefore do not recommend so and so for future assignments which will be affected by her behavior. I am impressed with his technical expertise and recommend his selection for attendance at Command and General Staff College.

Well, obviously her antisocial behavior in this particular evaluator's opinion had a big impact upon that individual's career. So to the extent that she influences it in a negative way, we have to look at it as if she influences it in a positive way.

I will go on to another one:

Technical competence of the highest order. He and his wife did not try to maintain a previously active group of company officers' wives. They were counseled.

Another one:

Technically proficient; eagerly states his opinion; needs improvement in supporting and enforcing actions relevant to improvements in quality of life goals for his command; yes in all areas excluding a personal people problem.

But in each of these sample cases the wife is critical to an evaluation of his upward mobility or lateral mobility or downward mobility as far as the Army or whatever service is concerned.

So I don't think it is just a question of us appealing to a stacked audience. I had hoped, frankly, that we could have the DOD here for that very reason, to ask representatives of the Department of Defense what is the relationship of a wife to her husband's career? Is it important? Can she lead a separate life of her own with her own job without responding to the demands?

There was one woman who refused to participate and work in a thrift shop. Maybe she was tired when she got home from her own job. But the fact of the matter is that if she doesn't do it, that goes as a negative in his chart.

So I think in looking at it objectively as a matter of sheer equity that they really cannot have any objection to what this committee is trying to do and I project will in fact do. So that is why I expressed my disappointment initially about the failure of the Department of Defense to come forward because I think that they could perhaps offer

some interesting testimony as to how we could improve it and whether in fact they think the Jepsen bill as currently drafted is unfair.

For example, you don't like the 50-percent provision and they don't either. They don't want a 50-percent provision. They want a set amount. You know, we ought to look at that and find out whether or not they have suggested it is a potential windfall for a former spouse. If you get a large increase in retired pay, they say, well, why should she benefit from that in relation to her years of marriage.

Well, I am just saying there is a question to be raised and it would have been much better had they been here in order to offer that so that we would have the benefit of knowing whether we are moving in the right direction.

So, anyway, gentlemen, I thank you for your testimony. I think we will probably submit some more questions to you since you didn't have a chance to look at the medical benefits provision to see whether or not we might change that as far as the 20-year requirement is concerned or whether there is any precedent, for example, for extending the medical benefits for a limited period of time even following the dissolution of the marriage itself. We may want to get your recommendations on that.

Senator COHEN. I think I will cease and desist, to coin a legal phrase, but I do thank all of you for coming. We have certain questions to be posed to you by the minority counsel and a number of us will be submitting questions to you and you may submit answers for the record.

Thank you.

Mr. BESOZZI. I am going to just ask you a few questions and then I will submit the rest and you can answer them for the record.

First, we both recognize that there are many Federal and State statutes that prescribe certain periods of time that have to pass before an individual is entitled to the benefits of a particular statutory scheme.

Now here we are proposing at least in Senator Jepsen's bill to remove the effects of the *McCarty* decision only for those who have been married for at least a particular 5-year period, where the marriage is for 5 years and at the same time the individual is earning credit toward retirement. The Defense Department has indicated preliminarily that they want to expand that period to 10 years.

My question to you, gentlemen, is is there a potential for some kind of legal attack, constitutional attack possibly on this kind of classification discriminating between those people, let's say a marriage that was less than 10 years or less than 5 years, vis-a-vis one that is beyond that, and, if you think there is, what is your assessment of the potential for success of such a challenge?

Mr. ARENSTEIN. I think that there is a potential discrimination, but I think under *McCarty* and Federal preemption I think Congress would have the right, at least when it comes to this area, to legislate that into the law and I don't think the Supreme Court would overrule it because they have invited you to make legislation regarding it.

With regard to that provision, though, it really is the minimal amount. If you are talking about 5 years in the service, the man who is married to the military spouse could be married 20 years and then go into the service or go in initially, that 5-year period is a minimal

amount in the 20-year minimum to get the pension itself. So the discrimination that exists can really not be that much.

Mr. BESOZZI. How would a court, based on your experience, handle possibly the division of a pension in a marriage of, let's say, 5 years?

Mr. ARENSTEIN. Well, they have actuaries that value pensions and value both vested and nonvested pensions taking future interest dollar and cents values, figuring out how long the marriage existed and how much the pension would be that was earned during the time they were married. So if it was a lower pension for the first 5 years and the pension went up 20 years later, say that the man was a captain when they were divorced and becomes a field grade officer later on, the value in the divorce court would look at the captain for the period of time they were married and not consider for the purposes of property rights what he earned after the marriage or what he would be earning after the marriage.

Mr. LERCH. Well, I don't know as to whether I agree 100 percent with that statement. I think this is the very issue that we are talking about. I think this goes to the heart of what this legislation is, and that is that those kinds of decisions should be left in the hands of the State court which is the tryer of fact. It is looking to those very fact situations that you are referring to.

It will take into consideration what the rank of the person is at the given time that the award may or may not be made and that circumstances were involved in the marriage. Some States still look to fault and some don't look to fault. In some States, you know, all of those may be considerations in the ultimate division of the properties.

I think our position is that we should have as few limitations that preclude the court from making its genuine decision after a presentation of the facts as we can possibly get by with. We obviously would prefer having no limitation. Whether there is an equal protection question, I have no doubt that some person may bring that up and that question may ultimately have to be determined by the Supreme Court. I don't know what the answer to that is. I do see it as an equal protection problem, though. But it may be that because of the fact that the legislation has been mandated, so to speak, by the Supreme Court that it won't come up.

Mr. BESOZZI. You talked about other interferences. The other examples of that would be the percentage limitations and the possibility of a remarriage cut-off which the Defense Department has discussed. I think you would view those also as being inconsistent with returning this essentially to the State courts to perform the task that they have traditionally performed in dividing property?

Mr. ARENSTEIN. I would like to address that remarriage cut-off because that is generally left for spousal support in the State courts in most of the States that I am concerned with and there is not a cut-off for property rights. If a court is going to make a decision as to property rights remarriage has nothing to do with it.

Again, Congress has the power to make the legislation here, but that is really blatant discrimination on the part of an ex-spouse.

Mr. BESOZZI. Let me make the record clear. That is not in the Jepsen bill.

There have been some discussions on the part of the Defense Department and others about favoring such a position.

Mr. ARENSTEIN. I understand that.

Mr. BESOZZI. Let me ask you a question about military retired pay itself. Now the Supreme Court spent the initial portion of its decision discussing the differences between military retired pay and what it described as "a typical pension or retirement plan." But then the Court went on and said that it need not decide whether Federal law prohibits a State from characterizing retired pay as deferred compensation. It decided the issue on the Federal preemption question.

Some of the other characterizations that we have heard about military retired pay as to why we should not have legislation of this type is that it is different, it is compensation for services currently being performed, albeit a reduced level of compensation and the military members potentially can be recalled.

Let me ask you based on your expertise and experience in dealing with pensions and divorce laws is there a difference between military retired pay and other pensions and should it be treated as deferred compensation and have any State courts held that with respect to military retired pay?

Mr. ARENSTEIN. In my experience with the decisions of the courts regarding military retirement pay it takes 20 years to vest as opposed to the regular pension under ERISA, the civil pensions, which take anywhere from 10 to 15 years based on the Employer Retirement Income Security Act. There is the difference right there. It takes 20 years. You have to stay 20 years in the service to get that pension.

My experience with the State courts that I practice in have decided that pension just as if they would decide a civilian pension and the distribution in both New York and New Jersey, which are equitable distribution States, would be similar, except for *McCarty* right now.

Mr. LERCH. I would concur. It appears to me that the courts, even though there are differences in the actual pensions, would construe them as property rights, and I might add whether they are vested or nonvested, although there could be a difference of opinion in some States. But I think most States have gone to the basis of dividing it even though it may be a nonvested right. There are legions of cases that go into the vesting and nonvesting issue and stating that they do have the right to award.

Mr. BESOZZI. Let me ask you another question just relating to the interrelationship of community property laws and the Soldiers and Sailors Civil Relief Act which ostensibly afford some protection to the service member.

My question really is what is the impact of that statute on a community property State's ability to gain jurisdiction over the military retired pay of a military member who keeps his domicile under the Soldiers and Sailors Civil Relief Act in a noncommunity property State or another State?

Mr. BARBRER. It is our understanding that unless he in effect consents to the jurisdiction of the court in say California, as did Colonel McCarty by filing his action there, he could at least assert some residual protection under the Soldiers and Sailors Civil Relief Act as to his property rights. Certainly that is true for taxing purposes under 574 of that statute.

Now in the *McCarty* case I am somewhat surprised that in fact he did not file in the State of Oregon for the divorce. He was on active duty and presented an image of being an Oregon domiciliary.

If in fact our interpretation of the soldiers and sailors civil relief protections is perhaps too broad, then the problem that the Supreme Court addressed in *McCarty* could well be addressed in this legislation to make clear what is implied in the Soldiers and Sailors Civil Relief Act, and that is make it explicit and state that the individual military member carries his residence with him for all legal purposes unless and until he deliberately drops that, thus avoiding the problem the Supreme Court addressed in the opinion, the practical problem they were concerned with of involuntary transfers around the country subjecting the military member to inappropriate legal systems that he would never have chosen voluntarily to live under.

Mr. BESOZZI. I wouldn't want to prejudge what the Soldiers and Sailors Civil Relief Act affords in the way of protection, but I sense that you would at least favor putting in the legislation something that makes it clear that we are in no way tampering with whatever protections exist under the Soldiers and Sailors Civil Relief Act.

Mr. BARBER. Absolutely.

Mr. LERCH. One extension of that. If in fact the Soldiers and Sailors Relief Act is not as broad as we may feel that it is, then in addition to saying it is not tampering it may very well be that an amendment to the Soldiers and Sailors Relief Act clarifying that may well be in order and then resolve the *McCarty* problem, if in fact it doesn't already make it clear.

We don't want to comment on that because we haven't really looked at the act recently, but I think we as a group feel that that should have been raised somewhere in the course of the *McCarty* proceeding, whether on appeal or in the original proceeding.

Mr. BESOZZI. One question that relates to the definitional comments I think that were made in the statement, one of which related to the definition of court order. I note that the garnishment statute defines court order to include an order, and I quote:

> Issued by a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor such process.

I am now thinking about the Haitian divorce or whatever divorce decrees are or are not recognized which also might legitimately divide property and whether or not there should be some accounting for those types of decrees in any definition of court order that we might grant.

Mr. ARENSTEIN. I alluded to that in my remarks. Basically I think it is necessary because of not the divorce in a foreign country but the written property settlement agreement which becomes a part of that divorce decree. Two parties sit down with counsel, negotiate a settlement, they decide that it is quicker to go to Haiti or the Dominican Republic and get the divorce, there is jurisdiction there and most of the States in this country will recognize a foreign decree of divorce so that the other spouse or both spouses can remarry, and that becomes the divorce decree between the parties.

If you neglect that you are leaving out enforcement of property settlement agreements of divorces by spouses who go to these foreign countries. I think that *Ridgway*, which talked about a property settle-

ment agreement that was not in force, is a prime example of that. I think that it is very important to put something in there not just about the foreign courts but about a legal property settlement agreement negotiated fairly and equitably between the parties.

Mr. BARBER. I might add that under the same garnishment statute, the administrative process for the enforcement of support is recognized as being equivalent to a garnishment purpose. You have such an administrative process right here in the State of Virginia, the State of Washington, and the State of Alaska. Probably the definition of a court order could well be expanded to include an administrative order if in fact a so-called 1408 order would be the preferred method of enforcement.

Mr. BESOZZI. Let me ask you a question about the relationship between a section 1408 order and a garnishment order and vice versa. I think we talked about this before.

The Jepsen bill as drafted provides, and I will try not to be too technical about this, and maybe if my understanding is incorrect you can correct me, that if a 1408 order for child support, alimony or property distribution is in effect, a garnishment order under 42 U.S.C. 659 will be enforced only in certain limited circumstances, even though you might have still some of the 50 percent of the retired pay available to be used to satisfy a judgment. And vice versa, if you have a garnishment order, the 1408 order would not be effective even though there still might be some remaining percentage of the retired pay that could be reached.

Do you agree with this kind of interrelationship that sets up these two different orders and if we are going to have 50 percent or 60 percent or whatever the percentage might be, shouldn't that entire amount be available to satisfy any number of orders that come along until it is exhausted?

Mr. BARBER. Yes. And calling attention to my initial testimony, we feel that by simply redefining and cutting out the property right before we start applying any garnishment process and taking out of the bill any such limitation as you described and letting the matter be decided in relation to the remaining property of the former service member based on existing legislation under 15 U.S.C. 1673, there would be a sufficient protection to that service member where there are multiple support obligations as well as a property right that relate to the pension benefits.

Mr. BESOZZI. If we have some percentage limitations in here, shouldn't they be at least consistent with the garnishment statute?

Mr. LERCH. Well, we have tried to approach that particular point by amending the 50-percent clause, and it is suggested in there, to make it clear that the 50 percent relates strictly to the property right involved. If then that 50 percent is clearly a property right and not some intangible that we can't put our finger on right now, that would mean then that the other 50 percent would be just part of the service person's property to be utilized for whatever purpose they may have as a matter of right.

So that theoretically what could happen is that they could then garnish the other 50 percent——

Mr. BESOZZI. For alimony or child support.

Mr. LERCH [continuing]. For alimony or child support, and then the only limitation that would then be in effect would be through 15 U.S.C. 1673 which put a cap on the amount.

Mr. BESOZZI. 1673 would put a cap on it.

Mr. BARBER. And that cap has been applied by the pay centers for the services right now.

Mr. LERCH. But it would not be altering any of the laws that presently exist if you did it that way and those remedies would still be available.

Mr. BESOZZI. I thank you for your appearance and your testimony. It has been very valuable. Senator Cohen and Senator Exon will have additional questions to submit for the record.

[The questions, with answers supplied, follow:]

QUESTIONS SUBMITTED BY SENATOR WILLIAM S. COHEN

Senator COHEN. As a family practice attorney, can you tell me how well existing legislation for ex-spouses of civil service and foreign service retirees has worked in providing equity for the affected individuals?

Mr. BARBER. My experience in dealing with federal civil services and foreign service employees is limited to their support obligations. However, the cases I have seen generally involve either disabled pensioners or older persons than those who are retired from the military. As a consequence, lifetime spousal support is more likely and it is also more likely that the family has accumulated more assets than merely the pension. It should be added that the treatment of foreign service and federal civil service personnel in this area appears inconsistent with the treatment of state and county governmental pensions which are dealt with in the same manner as private pensions and other community property. Thus, the local police officer's pension may be distributed under circumstances where a diplomat's appears sheltered.

Mr. ARENSTEIN. I can only answer your question with regard to Civil Service retirees as I have not had any experience with Foreign Service retirees. The courts have handled the Civil Service retirees in a similar method to that of the private sector. With the legislation which is now in place, courts are able to fairly divide equitably and also in the community property states the property acquired during the marriage of the respective spouses. There have not been any major problems in any states that I am aware of and I feel that the legislation which is now in place at least on the Civil Service side is working very adequately. I am not well acquainted with those of the Foreign Service.

Senator COHEN. What are the basic differences between these existing laws and S. 1814?

Mr. BARBER. I don't have enough information presently available to me to distinguish the foreign and civil service ex-spouses' protection laws from S. 1814. However, it is my understanding that these statutes require a much longer marriage than that required under S. 1814. If that is so, the differing types of employment may be sufficient to also justify distinguishing the treatment of the pension benefits. The repeated transfers involved in the military among such undistinguished duty stations as Hancock, Michigan, Minot, North Dakota, and other relatively isolated locations, whatever the merits of upper Michigan or the wheat plains of the upper Midwest compares unfavorably with transfers from capital city, or commercial center to commercial center, that might be experienced by a foreign service spouse. The long separations at short notice experienced by carrier crews, such as those recently on station in the Persian Gulf, has no civilian counterpart in terms of strain on a marriage and family. Five years of that may be a whole lot longer in terms of "quality time" in a marriage than fifteen years moving from counselor office in Barcelona to embassies in Africa, to "Foggy Bottom" in D.C.

Mr. ARENSTEIN. Differences between existing laws and S. 1814. I believe that under the Foreign Service Act basic vesting is allowed to ex-spouses under the statute.

Senator COHEN. How do you respond to the criticism that passage of this type of legislation might encourage those considering divorce to shop around for the best State in terms of potential benefits?

Mr. BARBER. Military domicile is not affected by a transfer under orders (28 Corpus Jurus Secundem page 28; 50 USCA 574), and since property rights are based on domicile they are neither gained nor lost, as a result of such transfer (Kopasz vs Kopasz 237 P2d 284; Addison vs Addison (1965) 399 P2d 897; In re Marriage of Roesch (1978) 147 CalRptr 586). As a consequence, the comments about forum shopping are largely illusory. In fact, the military member exercises so much control over what he calls his domicile that it is far more likely he will use his concept to defeat a property settlement than to find himself subjected to an unfair one. As to how this could occur at least in the area of support, see the attached Court of Claims case, Morton vs. The United States, Trial Division No. 290–77.

Mr. ARENSTEIN. The Soldiers' and Sailors' Relief Act provides a vehicle for the soldier to use his domicile upon entering the Service as the state which controls rather than the state where he is stationed for duty. This is unless he consents to the jurisdiction of that state. I believe that this Act prevents forum shopping and can be used by the Service member as a tool to protect where he might deem to be an unfair law and an unfair state.

QUESTIONS SUBMITTED BY SENATOR J. JAMES EXON

RESOLVING CONFLICTING ORDERS

Senator EXON. What should the Service Secretary do if he receives two conflicting court orders? Should the Secretary be entrusted with the decision? What about a system where the affected portion of retired pay is held in escrow pending resolution of the conflict?

Mr. BARBER. For the purpose of resolving conflicting payover orders, there is presently a legal vehicle for deciding between two competing claimants for the same fund. It is called interpleader. It has been applied in domestic situations (see *Texaco Inc.* v. *Louis Lefevere* (1980), 610 S.W. 2d 173). Rule 22 of the Federal Rules is one form of interpleader. Statutory interpleader is available under 28 U.S.C. 1335. If the matter cannot be resolved by the Service Secretary, then this would resolve the matter.

Mr. ARENSTEIN. The question is a very interesting one and as to what the Service Secretary should do if he receives two conflicting orders, I would assume that this question anticipates that the Service member has been married at least twice. If you are talking about two conflicting orders from the same spouse, I believe that the courts will resolve that fairly quickly. However, when two spouses are involved, there is a problem. There must be some method to fairly "arbitrate" the problem. Obviously, each State court, if there are two different States, would have the order that they favor apply. However, if both spouses are from the same State, that State court could handle the problem very easily. Usually courts go on a first come, first served basis with regard to garnishment and this may be the proper method. S. 1814 addresses this problem in stating that such orders are on a first come, first served basis. Whether or not an escrow system or the Service Secretary should make the decision himself is an open question. The Service Secretary may not be aware of the family problems involved regarding both spouses, and it might be better for a judge who has all the facts in front of him to make a decision.

MILITARY RETIRED PAY FORFEITED UNDER THE DUAL COMPENSATION ACT

Senator EXON. In your opinion, does the bill as drafted exclude from military pay (in arriving at disposable retired pay) military retired pay forfeited under the Dual Compensation Act (5 U.S.C. § 5532)?

Mr. BARBER. Under the Dual Compensation Act the military member could presumably prevent the ex-spouse from getting a portion of the pension by entering Civil Service. While I personally believe this Act is at best unfair, since it discriminates against military pensioners and in favor of non-public pensioners, it would appear the Act as written adequately excludes such sums. However, there is a public policy question whether it ought to. By doing so, the ex-spouse is effectively deprived of her property while the former military member suffers no diminution in income.

It would encourage re-entry into government by the military retiree, since he or she would reduce the pension payout by the amount received in wages. This

could be resolved in some States by a spousal support order, or a retention of jurisdiction to order spousal support. But in others, notably Texas, this wouldn't occur; it couldn't. Yes, it covers the situation, but should it?

Mr. ARENSTEIN. The question here asks whether or not the Bill excludes military retired pay under the Dual Compensation Act. Under 1408(a)(4)(B) Title 5 is mentioned and included as a deduction from military pay. However, it should be kept in mind that a Service member who reenters the military is still receiving pay and, therefore, spouse would be deprived temporarily, at least for the time of service, of receiving benefits until he does retire. The reference to Title 5 is clear in my opinion and would exclude same.

AMENDMENT TO GARNISHMENT STATUTE

Senator EXON. There have been some suggestions that in lieu of overturning the *McCarty* decision we should merely remove the prohibition currently contained in the garnishment statute (42 U.S.C. § 659) against use of military retired pay to satisfy property settlements. Would such a change address the concerns expressed in the Family Law Section Report? If not, how does it fail to satisfy those concerns? As a practical matter, how would a state court in a community property state treat retired pay based on such a change? In an equitable distribution state?

Mr. BARBER. The expansion of garnishment to permit garnishment to enforce community obligations would be inadequate, indeed illusory. If there is other community property to divide, then the court will also have jurisdiction over it, to enforce its order. It will, for the most part, not have to dip into the military pension for this purpose. It is the pension that is the asset in at least some if not most military marriages. McCarty has placed it beyond the reach of the courts. To say it may be garnished to meet other property-related (as opposed to support-related) obligations is to give nothing.

A second shortcoming in this proposal is 15 U.S.C. 1673 that limits the percentage of military retirement that may be taken for any purpose. Altering the basis for seizure of the funds would not change the overall limit thereon. If the limit were dropped, it might permit a more equitable child and spousal support order in some instances, but would in others threaten to totally wipe out the pension. Inevitably, this would provoke another counter reaction in the courts and again the issue would be before you. The solution we offer is in the context of this statute. By permitting the property share of the pension to be called just that, and then applying 15 U.S.C. 1673 to the remainder, the pensioner is assured his pension will not be wiped out.

In answer to your other questions on this point: No, it would not meet the goal of the Family Law Section. The Section wishes to restore state law to the primary level that it held in this area prior to McCarty. It is our position that placing the matter back in state court will best effect justice for all concerned. The "solution" offered by this question is no solution. At best, all it could be applied to would be debts that would be community debts for which there are no other assets for payment. Some relief, but not as fair as simply making available for property distribution in all cases.

In any state, community or equitable, it would be looked on as a debt repayment fund. The legal approach to the problem would not vary significantly on this property distribution system.

Mr. ARENSTEIN. I do not believe that in lieu of overturning the *McCarty* decision and removal of the prohibition currently contained in the garnishment statute against use of military retired pay to satisfy property settlements would reflect our concerns expressed in the Family Law Section's resolution. The military retired pay is looked upon as a property right and if it still is excluded as a property right, a spouse who is divorced who has nothing but the retired pay would still receive nothing out of that member's pension. It is only when you consider it as a property right that you can then divide it "equitably" between the parties. I believe that in both a community property state and an equitable distribution state, the court would not consider it a property right but would only allow satisfaction of other property rights against this pension. Therefore, it is important that this be considered to be a property right.

LUMP SUM PAYMENTS

Senator EXON. Some states have gone quite far in protecting court-ordered rights of the spouse in military retired pay. For example, in *In Remarriage*

of Luciano, 164 Cal. Rptr. 93, the court held, "That the non-employee spouse is the one who has a choice as to when his or her share of the pension . . . shall begin. This election can be made at any time after the pension is matured by motion in the trial court by the non-employee spouse." This could be construed to authorize a court order directing the military member to retire. S. 1814 protects against that. The Idaho Supreme Court goes further (*Ramsey* v. *Ramsey*, 96 Idaho 672, 535 P. 2d (1975)), by evaluating what the value of the former spouse's annuity will be if the retiree lives a normal life expectancy and then including that same in a lump sum property distribution. Why shouldn't we legislatively protect the serviceman against this kind of ruling?

Mr. BARBER. I agree with the idea that the military member ought not be forced into retirement. However, by the same token, if eligible, he or she ought to have the option of retiring if they see fit to do so. Thus, flexibility and neutrality on the part of the federal government should be the appropriate legislative philosophy.

In response to the question of Senator Exon, I believe Congress already has legislated a protection against an unduly harsh order requiring lump sum payment of the discounted value of a pension. That remedy is harsh in and of itself, but it is effective. The remedy is bankruptcy. An order or judgment to pay over a sum as part of a property settlement as opposed to support would be dischargeable. Thus, the military member is already protected against overreaching by a spouse or ex-spouse.

Mr. ARENSTEIN. Most State courts take into account the length of the marriage, the length of time in Service and the position of the parties in awarding payments. They usually give the Service member an election as to whether or not to pay in a lump sum or to pay as if and when he receives the said pension.

Usually this is worked out as a percentage of the pension when received. If you have concerns with regard to lump payments, I believe that is something that could be addressed properly in the Bill as to how to award the pension rights. However, when there is various other property to be used as an offset, it is generally more convenient to allow the ex-spouse the right to this property to end the marriage and property rights once and for all. It is only when there is not adequate funds that this becomes a hardship.

PERCENTAGE LIMITATION

Senator EXON. Under the garnishment statute up to 65 percent of disposable retired pay may be garnished to satisfy delinquent child support and alimony payments. S. 1814 puts caps on disposable retired pay available to satisfy court orders at 50 percent. Do you think the percentage caps in this law should be consistent with those in the garnishment statute? If not, why not?

Mr. BARBER. Our position is that the percentage cap should be consistent with the garnishment limits available for support. The point of confusion appears to be with what is support and what is property. If an ex-spouse has a property right in the pension, that should be paid before a support obligation is enforced. The obligated parent would then pay this support out of his or her share of the pension. Thus the confusion of equitable or community property rights with support orders that now exists in the present version of S. 1814 would cease. Designating clearly such property as the property of the non-military spouse would also facilitate collection of child support from the spouse by garnishment should that spouse also have a support obligation. Admittedly, this would be unusual, but not unheard of.

Second, it is unfair to cap the recovery of support at the proposed rate of 50 percent. The alternative rates of up to 65 percent are provided for in such a manner that second families are taken care of, and in such a manner that they may not be applied unless the obligated parent is severely behind in his or her support. Thus, the present statute limiting garnishment, 15 U.S.C. 1673, provides for all the contingencies to which this 50 percent limit is supposed to apply, and in a far more balanced fashion.

One additional point, 15 U.S.C. 1673 applies its limits to a total income of the obligated parent, not just one source of income, as does S. 1814. Military members with a retirement age of 40 to 45 frequently obtain full civilian employment in states far distant from their former families. As a consequence, they may have a civilian income equal to or in excess of their retirement. However, these new jobs are located outside of the jurisdiction that is enforcing support for the prior family. As a consequence, unless the pension can be garnished for the full support obligation, long and involved legal proceedings may be required to enforce that

support obligation. If 15 U.S.C. 1673 were the only federal limit on garnishment, as it is for every other support obligor, no matter by whom employed or pensioned, then all the earnings could be taken into consideration by the court that heard the divorce, and it could then seize so much of the pension as that law would permit. This would avoid giving the military pensioner an incentive to seek out sheltered civilian employment to defeat an order of a court.

Mr. ARENSTEIN. I believe that the percentage caps should be consistent and I believe that the 65 percent under the garnishment statute would be the proper percentage to use. I even believe more so that a Bill without any percentage would allow the courts to equitably divide the property therein.

Mr. BESOZZI. Thank you for your testimony.

Mr. LERCH. Thank you.

Mr. ARENSTEIN. Thank you.

Mr. BARBER. Thank you.

Mr. BESOZZI. The subcommittee is adjourned.

[Whereupon, at 4:35 p.m., the subcommittee adjourned, subject to the call of the Chair.]

UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT

WEDNESDAY, MARCH 10, 1982

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE ON MANPOWER AND PERSONNEL,
Washington, D.C.

The subcommittee met in open session at 10:05 a.m. in room 224, Russell Senate Office Building, Senator Roger W. Jepsen, chairman, presiding.

Present: Senators Jepsen, Cohen, Denton.

Staff present: Anthony J. Principi, counsel; Paul C. Besozzi, minority counsel; Richard D. Finn, David S. Lyles, José E. Martinez, professional staff members; Ralph O. White, research assistant; Jacquie S. O'Grady, staff assistant.

Also present: Jim Dykstra, assistant to Senator Cohen; John Etherton assistant to Senator Jepsen; Paul Schreiber and Erna Engelkes, assistants to Senator Denton; Gray Armistead, assistant to Senator Byrd; and Greg Pallas, assistant to Senator Exon.

OPENING STATEMENT BY SENATOR ROGER W. JEPSEN, CHAIRMAN

Senator JEPSEN. The Manpower and Personnel Subcommittee convenes today to continue its series of hearings on legislation relating to the Supreme Court's decision in the case of *McCarty* v. *McCarty*.

This morning's hearings will give the members of the subcommittee the opportunity to hear from and to question Dr. Lawrence Korb, Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics. Accompanying Dr. Korb are Lt. Gen. Dean Tice and Mr. Robert Gilliat. Welcome.

We recognize and appreciate the strong interest that the Department of Defense has in legislation that pertains to the military retirement system. Action on S. 1814 and similar proposals has been held in abeyance until your Department's official position has been presented to this committee.

As I mentioned in my opening remarks at our last hearing, there has been a great deal of misunderstanding surrounding the *McCarty* decision and legislation in response thereto.

I therefore believe that it is most important for the committee to know whether the application of community or equitable property principles could potentially frustrate the management needs of the active services. In this regard it would be most helpful to the commit-

tee if you could provide us with the empirical data, surveys, and other information to support your position and the concerns I have heard expressed on recruiting and retention.

This is not a new issue. Prior to the *McCarty* decision the consideration of military retired pay by the State courts in fixing property rights between parties had taken place for a great many years.

On April 21, 1941, the Supreme Court of the State of California in the case of *French* v. *French*, to my knowledge, first addressed this issue. In succeeding years, other States employing community property and equitable distribution concepts permitted distribution of military retired pay upon divorce.

On June 26, 1981, some 40 years later, the U.S. Supreme Court, citing the Supremacy Clause of the Constitution and the Doctrine of Federal Preemption held that their reading of the law prohibited such a division of military retired pay. However, they invited the Congress to legislatively correct the situation as it saw fit. Before proceeding further, we solicit your comments and recommendations.

But I again would point out that the Supreme Court in their decision invited the Congress to legislatively correct the situation as it saw fit. Thousands of American women, ex-military spouses, have been suffering because of this critical situation. We need to address this right now.

So, before we proceed, Dr. Korb, I will defer to Senator Denton, who has an opening statement. I will read into the record a statement for our chairman, Senator Tower.

Senator Denton?

Senator DENTON. Thank you, Mr. Chairman. I have to make a speech on the floor in 15 minutes or I would remain. So, I appreciate your indulgence.

This is a very complex problem, one which I have not come down on. I have recommendations that conflict within my own staff. This is the opening statement I have for today. I intend to give it continuing study.

The welfare of those who serve in our country's uniform is, of course, close to my heart. Because these fine men and women are governed by Federal law in almost every aspect of their lives, they are, in a sense, hostages to the wisdom of the Congress.

In recognition of their dedication, their loyalty, their wholehearted commitment to our Nation's security, we Members of Congress must treat with care and concern every proposal to tighten the grip of the law on their private lives. We all agree that these people must be treated fairly.

In times of peace as well as war, the exigencies of service cause hardships that are virtually unique, in degree if not in kind, to the military community. A military career is a transient existence where the rewards of thrift evaporate in the face of unexpected expenses of frequent reassignments. Separation from family for long periods and the uncertainty of what the future holds for the family are the normal conditions of service. These pressures, beyond the control of a service member, place a strain on marriage that is too often irresistible.

I would have to note personally that this strain is worse on the wife, in my view, than it is on the husband in the case of a male serviceman.

Consideration of S. 1814 places before us the problem of insuring fair, economic treatment for divorced spouses of active and retired members of our uniformed services. In this consideration we must be guided by our desire to be fair to both parties in a service divorce, having regard for the special vulnerabilities of service members created by the condition of their service.

Examples of worst cases that grow out of inequities have been presented to this committee to illustrate and dramatize the position of people who have different views of the merits of S. 1814. I have received numerous letters on the subject that describe most fearful injustices. Yet, I sense the possibility that the cases we have heard are by no means representative of the overall situation.

The overwhelming majority of service divorces involve relatively young spouses whose right to a portion of the service member's retired pay can be defended only by the most tortuous arguments. To help the deserving minority, one must guard against causing injustice to a majority.

All divorces are different, and the best we can hope to do is limit the Federal Government's role in this unhappy business to the minimum that will permit equity before the courts having jurisdiction within the several States.

S. 1814 is designed primarily to overturn the Supreme Court's decision in the *McCarty* case that military retired pay is not property and subject to division as such in community property States and those other States that view retired pay and pensions similarly. I acknowledge the force of the argument that each State's laws should apply equally to all its citizens, and that there should not be an unrestricted exemption for the citizens who have served their country in uniform.

But that argument is invalid in light of the outcome of *McCarty*, where it is held that the nature of the military retirement entitlement justifies such an exemption.

S. 1814 contains certain safeguards that did not exist prior to the *McCarty* decision and would be necessary if that decision is nullified, and in my opinion serve the cause of equity. One is the prohibition against transfer of retired pay rights to a third party by bequest or other means.

The provision for divorced service members to make voluntary assignments of portions of their survivor benefits to divorced spouses is a most welcome concept, and I strongly support the provision requiring payment of court-ordered alimony and child support by the service secretaries. I also support the health care clauses in S. 1814 providing grace period coverage and conditional treatment of certain preexisting medical conditions.

In the aggregate, however, I believe this legislation as now written moves too far in the direction of serving the interests of the divorced spouse at the expense of the welfare of the service member, who has all too little control over the forces that modulate the rhythms of family life.

After much consideration I must conclude that the provision in S. 1814 establishing retirement eligibility for divorced spouses after only 5 years of marriage violates the basic purpose of the bill; that is, to help provide economic security for older divorced spouses of long marriages to service personnel. I am also concerned that a number of

variables may impact adversely the provision limiting the divorced spouse's entitlement to 50 percent of disposable retired pay.

Finally, I believe that S. 1814 as written leaves critical questions unanswered that must be addressed before final action on the bill is taken by this subcommittee.

Again, I must state that S. 1814 fails to protect adequately the interest of service members. Without the slightest disparagement of its distinguished sponsor—whom I hold in the highest professional and personal regard—or his intent to remedy real injustices for some divorced service spouses, and without disparaging my own deep concern about the cases that have been brought up here and which do exist, I do intend to offer at the appropriate time amendments that will accomplish this end while reducing the potential injustice to service members. The composition of those amendments will await more findings, more evidence, and more study on my part.

I thank you very much, Mr. Chairman. I do have questions which I will submit for the record and ask that they be directed to Secretary Korb.

Senator JEPSEN. It will be done, Senator.

Senator Cohen, do you have a statement?

Senator COHEN. Let me just make a couple of observations. I do not have an opening statement beyond what I had to say in the last hearing that we held, Mr. Chairman.

But let me say on behalf of the chairman who introduced this bill, there is no piece of legislation that has ever been introduced that is not subject to modification—whether it is a 5-year vestment rule or a 10-year, or some other figure that is selected. The purpose of this hearing is to have a starting point under which we can start to reexamine what obviously has been an inequity as far as the *McCarty* decision is concerned.

I think it came out very clearly during the last hearing that a wife plays an instrumental role in the career of her husband, whether in politics, in business, or most particularly in the military service. And to the extent that she does bear a direct role upon whether he is promoted or not promoted; whether he gains in his career in the military, she has a vital role to play. And to the extent that she plays a role, she ought to share to some degree in the retirement benefit. I am committed to that particular position.

Now, whether or not it is a 5-year vestment rule or not remains to be seen. But I would take issue with the notion that somehow you have to introduce a perfect bill not subject to amendment. That is why we are having the hearing process. That is why we are here to have the testimony of Mr. Korb and General Tice, and others, to find out whether or not the bill does go too far in one direction. Perhaps we do have to modify and amend it.

Put I think the bill is headed in the right direction and it is designed to reverse what is otherwise a challenge of fundamental wrong.

So with that, Mr. Chairman, I will hear from the witnesses and perhaps put some questions to them.

Senator JEPSEN. Thank you, Senator. I would like to read the following statement from Senator John Tower into the record.

[Reading:]

The *McCarty* decision has wrought great uncertainty and confusion to one area of the law traditionally reserved to the states. It is essential that the

Congress move with all deliberate speed to clarify its intent with respect to this issue.

The Supreme Court has shown great deference to the Congress in matters relating to the military and invited this body to take appropriate action if it deems necessary.

I applaud Senator Jepsen for taking the initiative in conducting these hearings. S. 1814 represents a reasonable compromise to a difficult situation. It strikes a proper balance between the Federal interest in the military retired pay of a member and the state's interest and expertise in determining marital obligations between spouses.

Occasionally, there will be abhorrent cases in the application of the law. However, on balance S. 1814 is sound and equitable legislation and I am pleased to be a cosponsor of this bill.

Senator JEPSEN. Dr. Korb, you may proceed.

STATEMENT OF HON. LAWRENCE J. KORB, ASSISTANT SECRETARY OF DEFENSE (MANPOWER, RESERVE AFFAIRS, AND LOGISTICS), ACCOMPANIED BY LT. GEN. R. DEAN TICE, USA, DASD (M.P. & F.M.), AND ROBERT L. GILLIAT, ASSISTANT GENERAL COUNSEL FOR MANPOWER AND HEALTH AFFAIRS

Dr. KORB. Thank you very much, Mr. Chairman. It is a pleasure to appear before you today and participate in this very important hearing on your bill concerning former spouses of members and former members of the uniformed services.

The Department of Defense has always considered domestic relations matters to be primarily governed by State law, through State courts. Last year the Supreme Court in *McCarty* v. *McCarty* held that military retired pay may not be divided as community property under State law in the event of divorce.

Senator, your bill would in effect overturn *McCarty* by allowing individual States to apply their own divorce laws to determine whether retired pay may be considered a marital asset upon dissolution of a marriage. It would allow the enforcement of certain court orders and provide former spouses limited health care and other benefits under the survivor benefit plan.

The Department of Defense recognizes not only its responsibility to its members but also to their spouses, their former spouses, and their families. But our prime interest is to develop and maintain a strong, stable military force—and adequate military compensation plays a major role here.

In my judgment, military retired pay is one of the most important factors in building and retaining a career All-Volunteer Force to meet national defense objectives.

I believe the provisions in the first section of this bill to divert up to 50 percent of a service member's disposable retired pay would be inequitable unless the 50-percent limit is computed as if the member could retire at the time of the final court order. Pay increases for promotions and longevity from the date of divorce to the date of retirement would substantially increase a serviceman's retired pay. If subsequent raises could be included, they would constitute windfall benefits for the former spouse to which he or she had made no contribution.

In addition, it would give a former spouse the basis to claim a vested future interest in compensation even though the member does not have a vested interest until he or she actually retires.

As you know, military retired pay is not based on a contributory system. It has no loan or redemption value. Unlike divisible property, it cannot be willed. Whereas pensions typically represent a gratuity for past services performed, a key reason for military retired pay is that it is continued pay at a reduced rate for reduced services. It recognizes a retired member's vulnerability to recall to active duty in the event of national emergency. Military retired pay is not just a typical old-age pension plan because of these unique features.

The Department is primarily concerned that this proposal could diminish the value of service retirement at a relatively early age as a major recruiting and retention incentive..

Senator COHEN. If you would stop right there, Mr. Korb. Do you mean to say that you feel that a decision pertaining to retired pay is used as an incentive to recruiting? Do any of the recruits coming in who are married look to see whether or not they will be divorced and how their future retirement will be divided? Is that what you are suggesting?

Dr. KORB. No, that is not what I am suggesting.

Senator COHEN. Well, how will that have an impact upon your recruitment?

Dr. KORB. What I am suggesting is that military retired pay is one of a number of things that we use to tell people about the benefits of a military career. We tell them that if they come in, after 20 years they will be entitled to retire at this particular time.

Senator COHEN. But what impact does that possibly have? Do you tell them, "But if you get divorced it is going to be divided under State law?"

Dr. KORB. No, I do not say that, Senator.

Senator COHEN. I understand what you are saying, but I do not find the connection between what this bill does and how that is going to impair your recruiting.

Dr. KORB. I did not say that. The statement I just made was that military retired pay—I was talking about the fact that if, for example, a person were to be divorced at the 5-year point in his career, under Senator Jepsen's bill, with no provisions to say that the former spouse would not be entitled to gain from the next 15 years of service, the individual may decide at that particular time that the present value of his retirement pay would be diminished to the point that he would not stay in. This would be a factor that he or she would consider.

Senator COHEN. That has to do with reenlistment but not as to a major recruiting or retention incentive.

Dr. KORB. Well, retention in the sense of reenlistment. I made the point before where we are talking about military retired pay in the generic sense that it is one of the things we use as a recruiting tool. It is not the major thing, but it is something that is considered.

Senator COHEN. I know, but a person coming into the military does not look to see whether or not he is going to be married or divorced as part of his considerations of whether he is going to go in the service.

Dr. KORB. I did not say that.

Senator COHEN. I know, but that is the implication. I think you ought to clarify it.

Dr. KORB. If that was the implication, it should not have been taken that way.

Senator JEPSEN. Since we are stopped I might also add, courts have been working on this assumption for over 40 years until the *McCarty* decision which, I think, is another reason to supplement a little bit what the Senator was saying. How we got by for all those years if it had a major impact—and that is what you say here—"It could diminish the value at a relatively early age as a major recruiting and retention incentive." So much for that.

Dr. KORB. I think, Senator, I said it "could." I did not say it was the primary thing. And do not forget, we do recruit a lot of prior service people.

Senator COHEN. Well, you know, I think it is important that we focus upon recruitment and what are really service incentives. For example, the GI bill is something that I understand you are going to be talking to Secretary Weinberger about fairly soon.

The GI bill is regarded by many on this committee, and I believe by the Secretary of Defense, as a major recruitment incentive. I will not cloud up the record at this particular point by asking your views, but I would hope that you would solicit the views of the members of this committee before reaching any decision yourself or making such a recommendation.

But I think that is a major incentive and I will ask General Tice whether or not he agrees, the GI bill is a major recruitment incentive. Now, that is something we can point to.

I do not think you can point to the question of the division of retired pay as to an incentive or disincentive. Retired pay obviously would be in a sense saying, "If you, in fact, serve 20 years, you will get the following benefits." Obviously that is true. It has no bearing in my judgment as to, "By the way, if you get divorced, you will only get 50 percent of that." I mean, that simply is not an issue.

Dr. KORB. As I was saying, retired pay remains one of the most important benefits in military service. The enforcement of divorce decrees under the terms of S. 1814, if not prudently limited, could reduce the attractiveness of such practices as an incentive and thus hinder our efforts to build a balanced, experienced military force.

On the other hand, an equitable bill will demonstrate to spouses our concern for their interests and encourage them to remain supportive of the member and career commitments. Any law which, because of its lack of balance and restraint, is perceived as a threat to retired pay or other benefits may have to be offset by additional benefits to avoid an exodus of midcareer members.

I further believe the enforcement provisions should terminate upon the remarriage of a former spouse. This position is consistent with the provision for former spouses of Foreign Service Officers who remarry before age 60.

I also have a problem with the requirement that a spouse or former spouse be married to a service member for as little as 5 years. It is a far shorter period than required by other Federal ex-spouse benefit laws, such as social security. Where the marriage is of such a limited duration, the spouse not only may have made less than a major contribution toward a member's career, but also is not likely to have sacrificed his or her own career.

Considering the fundamental purposes of this bill vis-a-vis military pay and retirement, I would urge that the first section of the bill be

amended to require that before it becomes effective, the spouse or former spouse be married to the member or former member for "at least 15 years during which period the member performed at least 15 years of creditable service."

The bill also should require a limitation of 50 percent disposable retired pay computed as if the member could retire at the time of the final court order. Such benefits, with the exception of child support, should cease if the former spouse remarries. Additionally, we believe that it clearly should be reflected that military retired pay, in spite of the diversion to a former spouse that would be permitted by this bill, remains the personal entitlement of the member.

Furthermore, it is essential, in our view, that the authority to enforce court orders under this bill be applicable only to those States which the courts may exercise discretion in determining the percentage of retired pay that will be awarded to the spouse of the military member. State courts bound by inflexible distribution or allocation requirements mandated in State law should not be authorized to make a distribution of the military member's retired benefits without regard to fault, need, or other equitable considerations. As we understand it, there are no more than three States where laws require this kind of inflexibility. In all other community property or equitable distribution States, military retirement under this proposal would become subject to distribution upon dissolution of the marriage.

We endorse the concept that the bill should have only prospective application and not include arrearages. Further clarification of the statutory language should be provided, however, to reflect that State court decrees issued prior to enactment of the bill may be enforced. Equity also suggests that those decrees issued since the *McCarty* decision and prior to enactment of the bill, that are amended by State courts under the authority of this bill be enforced.

We also recommend that the bill be amended to preclude forum shopping by limiting enforcement only to those decrees issued by a court in a State in which the member is domiciled, resides, was married, or consents to the jurisdiction of the court. With such a limitation, the bill would satisfy the legitimate concerns of those members who cite recent examples of situations in which a former spouse has exploited the long-arm statute of a congenial State to gain personal jurisdiction by the courts of that State over a member who previously had no personal affiliation with the State.

I believe these amendments would strike an equitable balance between the provisions of the bill and effective force management. They would provide a reasonable degree of consistency with other Federal retirement systems.

The Department strongly opposes the health-care features of section 2 of the bill. Federal medical care would be provided to a select category of individuals even though it is not available to other military former spouses. We do not believe such medical coverage should be provided within the military health care system. Additionally, we believe these matters need to be studied further and, more appropriately, should be the subject of separate legislation.

Section 3 of the bill would allow a service member to designate a former spouse as a beneficiary under the survivor benefit plan. The Department does not oppose this feature so long as it is clear that the

member may, in addition to dependent children, elect coverage for either the spouse or former spouse. It should be noted, however, that under the language of the bill, upon remarriage of the member or former member, the former spouse would no longer be an eligible beneficiary.

Section 4 of the bill needs to be modified to assure that existing garnishment authority relating to enforcement of child support and alimony is left intact. Otherwise, a spouse, former spouse, or third party, including a welfare agency, not qualifying under the first section of the bill, would have no enforcement remedy. The modification also should provide that enforcement under this bill and current garnishment law, added together, not exceed the separate maximum for each. This would be consistent with the underlying purpose of both provisions that not all the pay of an individual be subject to diversion.

The Department of Defense can provide no definitive estimates on the increased costs attendant with this bill, but we believe operational and administrative expenses would increase significantly in areas of processing, adjudication, determination, and operation.

In summary, if the first section were revised and the second section were deleted, the Department would not oppose enactment of this legislation.

Thank you, Mr. Chairman. I will be happy to answer your questions.

Senator JEPSEN. Thank you for your statement.

Senator Cohen does have a meeting that he is responsible for and, therefore, does have to leave early, and has asked that he question now, I think before we even go to other statements because of the time limit involved. What is your desire, Senator?

Senator COHEN. I would like to pose a few questions, and perhaps General Tice might want to make a statement.

Dr. KORB. There are no other statements.

Senator COHEN. No other statements. If I could have just 5 minutes or so.

I noticed in the way in which you closed, Dr. Korb, you said, "If these changes were made, the Department of Defense would not oppose such legislation."

The question I have is, would you support it?

Dr. KORB. I think it is a question of semantics.

Senator COHEN. It is a question of emphasis, and the question of emphasis is important because if in fact we have at least the silent consent of the DOD it does not enhance its chances for passage in the House. You might have a bill that is passed over here in the Senate but unless it is actively supported in the House we have found over the years that things can be undermined.

So, I was wondering, if called upon by, let us say, the House Armed Services Committee, your estimony would be what, "We are not opposed to it" or, "We do not support it," what would it be?

Dr. KORB. Our main concern is that the sections of the bill, as I outlined, be modified. That is our main concern.

Senator COHEN. But you do agree that there is an inequity under the current situation.

Dr. KORB. Yes, I do.

Senator COHEN. And that we ought to take steps to correct that.

Dr. KORB. Yes, I do.

Senator COHEN. And if we do that, then you would support the change in the law.

Dr. KORB. Let me consult with my counsel just to make sure.

I have no problem with that.

Senator COHEN. So, then in other words, DOD would actively support such a change in that law; is that correct?

Dr. KORB. I think——

Senator COHEN. Let us not play word games, all right? Let us find out exactly what the situation is going to be. If we make these changes—they may not be exactly your changes—but if we make some changes that take into account what you believe to be an excess of reaction to the inequity which everybody agrees has been visited upon divorced spouses, then the DOD would actively support such changes to correct this inequity. Yes or no.

Dr. KORB. We would support the changes, yes.

Senator COHEN. Now, you picked the period of 15 years as opposed to the 5-year period. Again, there is no magic in the number five. Why 15?

Dr. KORB. Our feeling is that people, once they reach that point in their careers, are going to stay until retirement. Before that period of time there are some who may take this into account and decide to get out of the service. All other things being equal, they may have stayed in.

So we feel that once an individual reaches the 15-year point, regardless of what happens here, it would not subject a person to getting out prematurely.

Senator COHEN. I think one of the fundamental questions that you really have not addressed, so far, is whether or not you regard retirement pay and a spouse's right to share in that as a property right.

I gather from your testimony that you do not. In other words, you would treat it as an alimony payment which, under most State laws, terminates upon the remarriage of the spouse.

In other words, it may be a dollar a year. Sometimes courts just give a dollar a year to keep the question open to find out whether or not the ex-wife's circumstances might change later on, that she might not have gainful employment; that the husband's position might be elevated by either his own efforts, or being promoted, a new job; come into some inheritance, and then we find a wife who has contributed substantially over a long period of time to a marriage who does not have anything. They may increase that particular award. But it is eliminated upon remarriage.

You view it as an alimony award in essence, rather than a property right; is that correct?

Mr. GILLIAT. Senator, I think that we can get hung up in labels here. We view it as a personal entitlement. I think that we are in effect supporting and not opposing a limited diversion of that personal entitlement under the circumstances described in Dr. Korb's statement.

Senator COHEN. Well, let me ask you about what the contribution is during a 15-year period. Would you not agree that a wife plays a vital role?

Let me ask you, General Tice. Does a wife play a vital role in the promotion of an officer, let us say, in the military?

General TICE. Most do.

Senator COHEN. I mean either positive or negative. I can read you, for example, Army officer evaluation reports that show that some wives have not been volunteering to do certain work in the late evening hours, and that reflects badly upon that particular officer and he may not be recommended because he has a bad spouse.

So, a wife's contribution or lack of contribution has a direct impact upon the either promotion or nonpromotion of an officer, or any career serviceman.

General TICE. A lot of that is related to the level of responsibility of the job the individual holds. There are certain jobs where the wives would not be called upon at all. But in most of senior rank, of course, many of them work harder than we do.

Senator COHEN. While I would agree with that, what I am trying to get at is, it does bear a relation directly upon whether he is going to get certain promotions or not; whether it is a happy couple, unhappy; whether he is diverted at home and not concentrating on his job. Does that not all have a direct bearing?

General TICE. Senator Cohen, I would not disagree completely with your statement.

I think the reason this thing is so complex and so difficult for us to cope with is that divorces have basically been left to the decisions of local State courts. I think that the military are having a hard time coping with the change of trying to address this with Federal legislation.

But I do not disagree with the contribution that wives make. I think the more important thing is the hardships they undergo where they do not have independent careers if they are married to military individuals.

Senator COHEN. Well, you see, that is what brings me back to this question of whether it is entitlement or whether it is a property right. What happens to a woman—and I have to disagree with you, Mr. Korb, about if a woman gives up her career for 5 years that does not impair her career. If you give it up for a couple of years——

Dr. KORB. Again, my point: I said "could." In fact, I was very careful throughout my statement to say "could" and "may," and you are taking these as absolutes.

Senator COHEN. All right. But is that not precisely the reason you want to give the courts the kind of jurisdiction to determine whether or not that has occurred? Who is in a better position to say whether or not if a woman is a career person she gives up her career, married this military man and says, "Now I cannot go back to it. Time has passed me by. There is a whole wave of new faces coming up who have more talent, more training. I cannot get back into college. I cannot refurbish my old skills, dust them off and compete in the marketplace any more."

What does she do?

Dr. KORB. I think the chances are less likely at 5 years than later on. That was the point I was making, and the courts still in most States have the capability to take that into consideration through the award, say, of alimony.

What we are talking about here is a situation: Does this or does this not become part of community property?

As I mentioned in the beginning, we have always felt that this is a matter for the courts to decide. What we have here now is a proposed Federal statute.

Senator COHEN. What the court has said is, the courts cannot decide it.

Dr. KORB. No, but State courts——

Senator COHEN. I understand that. But divorces have always been held in State courts. They are not a Federal issue.

Dr. KORB. That is what we are trying to do—get them back into State courts and establish the Federal guidelines.

Senator COHEN. I do not understand, I am confused because what you have said is that this is something that has always been in the courts. It has never been in the Federal courts, it has always been in the local courts.

Dr. KORB. In the State courts.

Senator COHEN. So, why all this confusion suddenly that we have a Federal statute designed to do what, generally speaking, has always been done?

Dr. KORB. The reason for it is the Supreme Court decision which asked Congress to speak on this particular issue.

Senator COHEN. Congress is about to speak.

Dr. KORB. You have asked for our opinion on this matter and we are furnishing them.

Senator COHEN. And I appreciate that. I am just trying to find out why 15, maybe it is 10. Some have suggested, for example, that it might be a greater incentive to have it 5 years even though I would agree with you that not that much has transpired during that 5-year period that would jeopardize that individual's rights or opportunities or career.

But you might find a practical decision involved, namely that someone who has only been married 5 years or less might be willing to accept a lump-sum settlement rather than wait out the 15 years or 20 years, and the court could award it—she at that particular point saying, "I will just sit back and wait until you receive your retirement pay and share it at that time with cost adjustments for inflation or whatever."

You might find a situation where a woman says, "Well, we have not that much together and I will simply waive the right that otherwise would come with a smaller lump-sum payment." That happens even today in other retirement systems.

So, it could work the other way whereas, if you have 10 years invested in a marriage or 14 years and then there is a divorce, the wife might be very reluctant to give up any share of that and simply wait it out, which could have that disincentive for reenlistment that you are talking about.

Dr. KORB. There obviously are all kinds of situations. I think Senator Denton made it clear in his statement that there is no Federal law that can guarantee perfect equity for both spouses in a divorce.

What we were trying to point out is that there are unique situations with military retired pay. For example, unlike a lot of other retire-

ment systems, if the individual does not do his or her 20 years, he or she is not entitled to anything.

Senator COHEN. Mr. Chairman, Senator Exon has some questions he would like to have submitted to the witnesses, which I will leave to you, Mr. Chairman, so I can pursue a couple more that I may have here.

Mr. Korb, you suggested that benefits be computed as if a member can retire at the time of the final court order.

Dr. KORB. Right.

Senator COHEN. What precedent do you have for this provision and is this the way benefits for ex-spouses of civil service retirees are handled?

Dr. KORB. My understanding is that the Foreign Service Act works under that type provision.

Senator COHEN. What about civil service, do you know about that?

Dr. KORB. In civil service it is my understanding this is completely in the hands of the courts. The court would determine how much the individual gets.

Senator COHEN. General Tice, I think you testified before the subcommittee in September and you said at that time that the bills introduced at that point were deficent in several respects and raised concerns from an enforcement standpoint which would be our ultimate responsibility. How does S. 1814 measure up in comparison with the other bills?

General TICE. It is much improved over what we were looking at last September, Senator Cohen. At that time we did not have your committee's bill formally submitted to us.

Senator COHEN. According to the March 15 issue of Army Times, any legislation such as S. 1814 would permit the split of military retirement pay that could affect the so-called catch-62 law.

Are you familiar with that, Mr. Korb?

Dr. KORB. Catch-62?

Senator COHEN. Catch-62. General Tice, are you familiar with that?

General TICE. I have heard of catch-22.

Senator COHEN. This is a catch-62 and I will give you a copy of the article and let you look at it, and then I will submit the question for the record.

It was news to me, too, but it does involve the question of whether or not you would have a retirement-splitting effect for ex-spouses as far as civil service, social security retirements and how this would impact upon the retirement benefits.

[From the Army Times, Mar. 15, 1982]

THE RETIRED SCENE "CATCH-62" INCLUDES CATCH IN EX-SPOUSE PAY SPLIT

(By Randall Shoemaker)

As a change of pace, there will be no snide advice to Congress this week. Instead, there will be snide questions.

The first question is, if you enact a military retirement-splitting law for the benefit of ex-spouses, how will you work that into the "Catch-62" law?

Picture this future possibility. A person retires after 20 years' service and immediately divorces his spouse. The ex-spouse is awarded 50 percent of the retired pay. The retiree works 20 years for the federal civil service and at age

60 again retires with combined credit for 40 years' service. To receive the credit, of course, the person must waive receipt of the military retired pay. But, then what does the ex-spouse get? Nothing, unless some other provision is made in law for this situation.

At age 62, the retiree's annuity would be recomputed to leave out credit for the military time. Because 20 years' civilian service is sufficient to qualify for civilian retirement at age 60, the person's military retired pay would be reinstated—and the ex-spouse would be back on the payroll.

But suppose the retiree had worked only 15 years on the federal civilian job before reaching age 60 and retiring with combined credit, in this example, of 35 years. When military retired pay is waived in this situation, it can't be reinstated later when the military credit is dropped at age 62. How would the law deal with this?

Will the Congress decree that ex-service members can't use their military time to qualify for federal civilian retirement? Or, that they may use only the portion not committed to the compensation of an ex-spouse?

The same question arises concerning a waiver to receive VA service-connected disability compensation in lieu of retired pay. Following the line of reasoning in earlier state court decisions (before *McCarty*), the ex-spouse might receive a VA payment equal to the military retired pay awarded at the break-up of the marriage. But one assumes, therefore, that any new law regulating these matters would have to provide for the VA compensation situation and the combined-service retirement situation.

So, perhaps the Congress in such legislation would order the ex-spouse's retired pay entitlement to continue to be paid out of the federal civilian retirement annuity. But, in the example we have drawn, the full civilian annuity would continue for only two years. At age 62, the retiree would lose credit for the 20 years of military service. The civil service annuity then would be reduced to only that portion based on 15 years of civilian work, providing 26.25 percent of the "high-three" salary. And because the military time was used originally to help the person meet the civilian retirement qualifications, the military retired pay entitlement could never be restored. What then?

If the retiree were no longer receiving military retired pay, or any portion of federal civil service retirement based on military service, would the ex-spouse then receive nothing? Or would the ex-spouse become entitled to 50 percent of the recomputed civilian annuity? Or would the ex-spouse be entitled to receive the same dollar amount as before, but drawing it from the civil service retirement annuity?

The ex-spouse entitlement, if it carried over to the federal civilian retirement payments, could hog most, if not all, of that money, leaving the worker nothing. On the other hand, if the entitlement set up by the retirement-splitting legislation didn't carry over, the purpose of the law would be defeated. These absurd outcomes are the product of an absurd law, the one which prohibits counting any period of military service after 1956 toward civil service retirement after a person becomes eligible for Social Security benefits. Specifically, the law bars counting any federal service toward two federal retirement systems—and you can't waive the Social Security entitlement to retain the more rewarding civil service retirement.

Someone will object that the retiree conjured up in this example would never fall into the Catch 62 mess with so much to lose. But, folks, these things happen. A person may not know and may not be advised of the right moves. We can't all be Lincolns, reading law books by the fireside at night. And it seems that some of those appointed to give advice on Catch 62 must have fallen asleep by the fireside.

The proper decision for this retiree—or any other with numerous years of post-1956 military service—would be never to waive military retired pay in order to qualify for civil service retirement. If the retiree wants to quit the civilian job before qualifying for retirement by the normal age and years-of-service standards, he or she may do so and (as long as five years of civilian service have been completed) receive a deferred civilian retirement annuity beginning at age 62. That way, the retiree retains both earned entitlements.

Unsuccessful efforts have been made for years to drag the federal civilian workers, kicking and screaming, into the Social Security system, thus ending the "windfall" benefits they reap by working and contributing on part-time nonfederal jobs just long enough to qualify for minimum coverage. If the effort is ever successful, however, it will require the repeal of the Catch 62 law since

the civilian workers necessarily would have to count the same time toward both civil service and Social Security retirement.

Returning to the ex-spouse issue, we wonder how Congress would work out that situation involving federal combined service retirement. If the ex-spouse was receiving 50 percent of the military retired pay for 20 years' service, could the retiree use the full number of years in a combined service retirement, or would the new law allow credit for only 10 years? If the credit were thus curtailed, would it mean the person could not qualify for the combined credit retirement without working extra years?

General TICE. If there are multiple retirements involved.

Senator COHEN. Mr. Korb, do you believe the legislation should apply only to those divorced after it is signed into law, or should it be applied retroactively between the *McCarty* decision and this legislation?

Dr. KORB. We would leave that up to the courts. Our feeling is that if the legislation is passed, this would be a matter for the courts to decide.

Senator COHEN. Well, would you oppose a provision where we say that an inequity was visited upon a number of people since you indicated *McCarty* poses inequities, therefore Congress intends to take steps to correct those inequities. If there is a lag time between the passage of legislation and the equity itself you would not, I assume, oppose our making it retroactive to the day of the *McCarty* decision.

Dr. KORB. No, sir.

Senator COHEN. You would support that, then.

Dr. KORB. Yes.

Senator COHEN. All right. I have some other questions, Mr. Chairman, but I will submit those for the record.

One other question. Have you had any comments from the individual services concerning this bill?

Dr. KORB. Yes, we have.

Senator COHEN. Could you tell us about what they are?

Dr. KORB. I would suggest that we have a Department position on all these points that you are taking into account here. I am only at liberty to discuss the official Department position.

Senator COHEN. You mean I have to call the Secretary of the Army and have him tell me what his service's opinion is of this particular bill; the Army, the Air Force, the Marine Corps, and the Navy?

Dr. KORB. What I am saying is that these were internal opinions made known to the Secretary of Defense. Based upon that he made his judgment that this would be our position. So you would have to get that from them. I am not at liberty to discuss those because they were opinions made known to the Secretary.

Senator COHEN. You mean to say that every single bill from now on that we deal with, we have to have a DOD position which we cannot take into account? I have been through meetings time after time and we line up all the service Secretaries and say, "What is your opinion, and what is yours, and yours, and yours."

You mean we have to do that in this case here, otherwise we are going to have kind of an Executive department rule, this is Executive privilege, these are internal memorandums, internal decisions and not the business of the Congress?

Dr. KORB. Senator, I can only tell you what the Department position is, speaking for the Secretary of Defense. I may not even have been at some of the meetings he held on this.

Senator COHEN. Mr. Chairman, I just simply suggest that at the next meeting you have we call each of the service Chiefs, have them appear and tell us what their positions are.

I appreciate your position, Mr. Korb, but I think that the record should reflect exactly what the individual services feel, have commented about S. 1814.

That is all I have. I appreciate your position, Mr. Korb.

Senator JEPSEN. Dr. Korb or whoever you designate, General Tice, Mr. Gilliat, I want to examine some of the logic to try to better understand your position on some of these points.

If I can refer to page 7 of your remarks with regard to, "The Department strongly opposes the health-care features of section 2 of the bill." It goes on to state, "Federal medical care would be provided to a select category of individuals even though it is not available to other military former spouses."

Now, one way of looking at the logic of this is that you are saying that according to the Department of Defense we should cut off these ex-spouses who were married to a military man for a minimum of 20 years for any form of health care, yet, we should provide full and complete health care to the retired military person's new spouse who has been married to him for 2 weeks, or 5 weeks. [Applause.]

I just want to explore the logic.

I would respectfully ask that neither anger or enthusiasm be displayed. I try to keep cool, I hope everybody else will.

Dr. Korb, you do not have an easy or fun thing to do here, I respect that, but I want to examine the logic, we must do that.

Dr. KORB. I think that is a very fair question, Senator. What was said was that we do not believe it should be provided within the military health-care system. The system is overburdened right now. We also do not provide the same coverage, it is my understanding, for example, if a service member dies; the widow or widower is not entitled to all the benefits provided under section 2 of the bill.

FROM THE FLOOR. Yes.

Senator JEPSEN. I would ask that if there is anything to be corrected or anybody that does not agree with Dr. Korb, you submit this in writing; or we would be pleased to visit afterward.

Dr. KORB. We think that this should be the subject of separate legislation. That this is a concern of the Congress, as you have indicated, if you want to provide for it separately through some other system.

It is just a situation where the military health-care system is already overburdened in the sense that it cannot provide the services in many cases even to the active duty members. We should prefer to have this provided outside of the military health-care system.

Senator JEPSEN. Let me pursue that logic. How many spouses are we talking about? Do you have any idea? Do you have a tab on how many we are talking about that are involved, that have been married for 20 years?

Dr. KORB. Again, do you want to talk about how many people could be affected by this bill? Or are you talking about how many people get divorced after 20 years of service?

Senator JEPSEN. That is it.

Dr. KORB. Right now about 80 percent of the career force is married, and if you say that the statistics for the military are the same as the

rest of society, about 50 percent of those people will get divorced. This is what we are talking about.

Senator JEPSEN. How many get divorced after 20 years, is our question?

Dr. KORB. We expect about 4,000 new divorces per year among retirees that have been married for 10 years or more.

Senator JEPSEN. Do you have anything on 20 years? You made a statement that it is going to overburden your system if we do that.

Dr. KORB. I am saying our system is already overburdened now. We do not have enough medical personnel. As you know from the Military Personnel Subcommittee hearings, we have problems in that area already.

What we are saying is that these people are entitled to health care, but this should not be done through the military health-care system.

Senator JEPSEN. But you provide full health care and other benefits to a second spouse, any new family and stepchildren, when the marriage takes place during retirement.

Dr. KORB. That is correct.

Senator JEPSEN. Why is it that for a new family that did not spend 1 hour of active duty in the military with the husband, you would provide full coverage for them. That is correct, is it not?

General TICE. Yes.

Senator JEPSEN. That is difficult to understand.

Now, a minor point but just for the record. You state on page 5 you "further believe the enforcement provisions should terminate upon the remarriage of a former spouse. This position is consistent with the provision for former spouses of Foreign Service Officers who remarry before age 60."

Do you know what the difference is, though, just from base one with regard to the Foreign Service's policy and the DOD's policy?

The policy for Foreign Service officers in the event of divorce is, the spouse automatically gets a share to start with. That is quite a difference.

Mr. GILLIAT. That is an entitlement under Foreign Service.

Senator JEPSEN. That is an entitlement.

Mr. GILLIAT. It is 50 percent unless modified by a court decree.

Senator JEPSEN. I just wanted to point that out. We are not asking for that in this bill. But when you start in blocks like this, it is quite a difference in approach.

On page 4—and we have touched on this a little already with Senator Cohen talking about the recruiting and so on—Dr. Korb or whoever he designates to respond, do spouses influence a career decision?

Dr. KORB. Yes, they do.

Senator JEPSEN. Would you say that it would logically follow, then, that the fact that female spouses might get denied compensation at a divorce could also adversely affect a decision to stay in the service?

Dr. KORB. It could. That is essentially why we want to balance two things—the question of equity versus the career needs of service people.

Senator JEPSEN. Could you explain that? I do not understand.

Dr. KORB. That is what we are trying to accomplish here. We do not want a situation where we create incentives for people to leave the service. At the same time we want to provide equity for the spouse who has sacrificed quite a bit for the service member because, as you

point out, this individual has a bearing on whether the person stays in or gets out.

We want to balance the needs of both parties here.

Senator JEPSEN. On the top of page 4 you refer to the fact that pensions typically represent a security for past services performed, a key reason for military retired pay. That it is continued pay at a reduced rate for reduced services. It recognizes a retired member's vulnerability to recall to active duty in the event of a national emergency.

Practically speaking, when in our history has a retiree involuntarily been recalled to active duty?

Dr. KORB. In World War II about 92 percent of the retired naval officers were recalled.

Senator JEPSEN. Involuntarily?

Dr. KORB. As far as I understand, they were just told to come in.

Senator JEPSEN. I will not belabor that, but if they were and if they did then indeed come back in, they would receive their entire active duty pay, once they are recalled to active duty; would they not?

Dr. KORB. Yes, that is correct. I think it is also important to keep in mind that we have just sent out some 90,000 mobilization orders to military retirees informing them where to go in the event of a recall and they become part of our total force.

We can furnish you the exact statistics, and they are for people who have been called up. It has happened all the way up through Vietnam.

[The information follows:]

RETIREES RECALLED TO ACTIVE DUTY

Retired military members have been recalled in significant numbers to active duty only in time of war or armed conflict. The Department of Defense has been able to reconstruct such data for two of our four services, the Navy and the Marine Corps. The retired population base against which such data, computed by the peak year of recall, is compared to is the total number of retired members receiving retired pay from the Department of Defense in those years. The data follows:

	Recalled	Total paid retirees	Percent of recalled to total
I. Navy:			
World War II:			
Officers (1944)	4,458	4,871	92.0
Enlisted (1942)	16,852	25,313	67.0
Korea:			
Officers (1952)	183	18,173	1.0
Enlisted (1951)	5,568	32,815	17.0
Vietnam:			
Officers (1968)	425	54,906	1.0
Enlisted (1968)	406	143,237	.3
II. Marine Corps:			
World War II:			
Officers (1944)	345	732	47.0
Enlisted (1942)	891	1,428	62.0
Korea:[1]			
Officers	(2)	(2)	(2)
Enlisted	(2)	(2)	(2)
Vietnam:			
Officers (1972)	10	10,244	.1
Enlisted (1968)	270	21,065	1.3

[1] Korean figures aggregate recalled retirees with recalled reservists and do not differentiate the 2 groups.
[2] Not available.

These data are indicative of military recall patterns in the recent past. Vietnam data are insignificant, because in 1965 the President decided not to recall to active duty either reserves or retirees, and the statistics reflect that decision.

The data presented here are conservative for two reasons. First, the "total paid retirees" figures include disability retirees, both permanent and temporary and, with Korea onwards, the "Title III retirees"; *i.e.*, those inactive reserve retirees 60 years of age or older. Such personnel, especially the disabled retirees, are unlikely candidates for recall to active duty. Second, we are using a "snapshot" of "high years" over a period of years instead of the *cumulative* number of retirees recalled in World War II, Korea, or Vietnam. Since retired recallees often serve for a year or two before reverting to retired status, we are missing those recalled retirees that did not pass through the high-year snapshot window. The net effect of these two factors would be to (1) reduce the "total paid retiree" base by the disabled and the Title III reserve retired, and (2) to increase the number of recalled retirees, and thus to increase the percentage of retirees recalled.

Senator JEPSEN. Dr. Korb, I am sure you realize that there are more and more women today who are pursuing careers themselves. Others continue employment to make an economic contribution to the marriage and family. Some of these women may go on to earn pensions or retired pay of their own.

Under the changes you propose, a female pension earner married to a military member would have no right to any portion of the former member's pension, while the member could receive some major portion of his wife's or husband's pension.

Do you think this is a fair and equitable system?

Dr. KORB. Unless I misunderstand the question, Senator, what we are saying is that after 15 years it is a matter for the courts to decide.

Senator JEPSEN. I think that what we are saying is, since *McCarty* v. *McCarty* that it does make military retired pay unique.

Dr. KORB. That is correct.

Senator JEPSEN. So you will be setting up a possible situation whereby a spouse—husband or wife—could be working on their own to earn and keep the family together and so on, and in the event of a divorce the nonmilitary person's retired pay or pension would be up for consideration and settlements, whereas the military retired person, in the same family, same unit, would not be.

That is not a question, just a statement.

Dr. KORB. The only difference, I guess, between the proposals is whether it would be after 5 or 15 years that the inequity would be corrected.

Senator JEPSEN. Well, now you are assuming we pass this bill. I am talking about right now.

Dr. KORB. Right now that is correct, and that is why we do not oppose your bill. We think this situation ought to be corrected.

Senator JEPSEN. All right. Senator Quayle, you tell me when you are ready.

Senator QUAYLE. Go ahead for a couple of minutes. Let me get up to speed here.

Senator JEPSEN. Dr. Korb, one more time for the record; opponents of S. 1814 and similar legislation suggest these bills would reduce the attractiveness of military careers and drive people out at mid career. In your opinion, do you agree with this position?

Dr. KORB. Yes, I think it can have an impact—a negative impact—on a person's decision to remain in the military.

Senator JEPSEN. And do you have empirical evidence to support that, or any evidence?

Dr. KORB. Yes, we do.

When you talk about empirical evidence, it becomes difficult because in fact we are talking about something that does not exist now. What we have to do is use models.

Senator JEPSEN. May I interrupt so that we can get started in the same blocks. We are talking about a decision of June 1941 that is 40 years back, make it 50. I mean, we have all kinds of evidence, all kinds of years that are available.

Dr. KORB. Are you saying you mean before *McCarty* v. *McCarty* were there impacts on people's decisions?

We have evidence to show, for example, that people would not want to be stationed in California, which made it automatic that military retired pay would be divided 50–50, which is the law in California.

We have evidence to show that people did not want to be assigned there, and if assigned there they would make decisions to get out of the service.

The services provide us a lot of evidence in people's questionnaires when they get out of the service to show the impact on that particular thing.

What you have now is a different situation in which we have raised the visibility of the issue and people are more aware of the situation. What we are really concerned about is the impact of S. 1814 on future retention decisions.

Mr. PRINCIPI. Dr. Korb, could you please explain what you mean by a 50–50 division? People did not want to move to California because of this 50–50 division? I did not know that California law required a 50–50 division.

Mr. GILLIAT. My understanding is that there are three States—California, Louisiana, and New Mexico—in which there is an automatic division of the community property 50–50.

Mr. PRINCIPI. But if you are married for 5 years, what kind of division would there be? A 50–50 division?

Mr. GILLIAT. A division of the community property that was gathered by the couple during that 5-year period.

Mr. PRINCIPI. What percentage would the ex-spouse, the nonmilitary ex-spouse, receive of that retirement, 50 percent?

Mr. GILLIAT. Again, it would depend on the value of the retirement at that particular point. If the individual were a lieutenant, it would be the value of his retirement pay as a lieutenant.

Mr. PRINCIPI. Under the formula utilized by the State of California it would be significantly less than 50 percent, it would be somewhere around 12 or 13 percent.

Mr. GILLIAT. It would be only a quarter of the total period of time that he would have for minimum retirement.

Mr. PRINCIPI. That is correct.

Mr. GILLIAT. Yes.

Mr. PRINCIPI. I think it is misleading to say that the ex-spouse would receive 50 percent.

Mr. GILLIAT. Right.

Mr. PRINCIPI. Did you actually compile data to show that service members prior to the *McCarty* decision did not want to be stationed in California because of an impending divorce, and could you supply that for the record?

Dr. KORB. The services so reported that to us, yes.

Mr. PRINCIPI. Could you provide the details for the record?

Dr. KORB. Certainly.

[The information follows:]

ASSIGNMENT PROBLEMS

During our discussions relative to the bill, it was indicated that the services had received inquiries concerning requests not to be assigned to certain states due to marital difficulties. Additionally, numerous pieces of correspondence have been received by the Office of the Secretary of Defense concerning assignment problems of a similar nature. These letters indicate difficulties that were either being encountered or anticipated as the result of such an assignment. Additionally, correspondence has been received concerning early transfer from certain areas in view of marital difficulties being encountered. No specific data, however, has been compiled as a result of these letters. We have no information as to the ultimate resolution of the particular problems involved.

Senator JEPSEN. For the record, Mr. Korb, do you really believe that a large number of people make their career decisions based on what might happen to their marriage years later?

Dr. KORB. Again, we do not know the impact.

Senator JEPSEN. I did not ask you if you did not know. I am asking you—and I guess it is a personal question, if you do not want to answer it you do not have to—do you really believe that?

Dr. KORB. My personal opinion is, that it would be a factor that people would weigh. For example, if your bill is passed intact, a person who has been divorced, say, after 7 years and who comes up for reenlistment at 8 years may decide that would be a factor to weigh in deciding whether or not to come on for another term.

We have asked the Center for Naval Analysis to run some projections for us based upon S. 1814, and again we are talking about using models. Their models, set up at Naval Analysis, say that it could result in over 40,000 fewer career man-years during the fiscal 1982 to 1987 period.

Senator JEPSEN. Prior to the *McCarty* decision, community property and equitable distribution States were divided in military retirement pay during divorce proceedings.

Were any problems noted in force management, say, over the 10-year period just prior to the *McCarty* decision?

Dr. KORB. The problems were noted, as I just responded before, with people who didn't want to be assigned to certain States.

Mr. PRINCIPI. Does the Soldiers' and Sailors' Relief Act provide any protection to the service member against such forum shopping and, if it does not, could it be strengthened in any way to preclude forum shopping?

Mr. GILLIAT. We have advocated that the bill be modified or limited to State of domicile, residence, marriage or consent. I am not sure that does not simply reflect the current law; but if it does not, we would propose that this be taken into account as a safeguard to allay the concerns expressed by military personnel who have written us on this proposed legislation.

Mr. PRINCIPI. Thank you, sir.

Senator JEPSEN. Senator Quayle.

Senator QUAYLE. Thank you, Mr. Chairman. First of all, I want to compliment you for these hearings and for the introduction of your bill. I think it is right on target and I certainly want to express my deep appreciation for you taking the lead on this very important issue.

Obviously, there is a certain segment of people who are affected by the *McCarty* v. *McCarty* Supreme Court decision.

I would like to start if first of all, Dr. Korb, do you believe that the *McCarty* v. *McCarty* decision is inequitable and should be overturned by the Congress?

Dr. KORB. Yes.

Senator QUAYLE. The bottom line is that you want to do something about it.

Dr. KORB. That is correct.

Senator QUAYLE. Is it my understanding that your disagreement with Chairman Jepsen's bill is just a matter of degree?

Dr. KORB. That is correct.

Senator QUAYLE. Could you summarize it for me—I tried to read the statement quickly—what is it that you do not like about this piece of legislation that he has brought forth, and how do you want to see it amended?

Dr. KORB. We have a number of concerns. I quess the primary one is the time which the individuals have to be married before it can be considered community property.

Senator Jepsen's bill talks about 5 years. We would recommend a higher number. Fifteen years are what we think would be appropriate.

We are also concerned about the fact that the bill might force a judge, without taking into account who is at fault or what was involved, to automatically divide the military retirement.

We also feel that the entitlement of the spouse should stop at the time they are divorced. In other words, if they have been married 16 years and the member goes on to serve another 14, her percentage should be based on 16 years, not on 30 years of service.

We also have some concerns about military health care because the system is already overburdened.

Senator QUAYLE. Is the administration going to come forth with their own bill, or are they going to endorse the Jepsen bill with modifications? Is that in essence what you are doing here today? And is this the administration's position, and how much support is Chairman Jepsen going to get on this?

Dr. KORB. The Supreme Court was very clear in saying this is something Congress should speak on, in the *McCarty* v. *McCarty* decision, and we feel this is an area where Congress should take the lead. We are here today to present the Department of Defense position on Chairman Jepsen's bill.

Senator QUAYLE. Are you basically saying to us today that since you want us to take the lead, that you will be willing to go along with whatever the Armed Services Committee decides.

We would like to have the lead. I mean, if the administration just wants to be quiet on this and come out and endorse our concepts and

say a few nice things about it, I am sure the chairman would be glad to go along with that. We can move this thing with great dispatch.

What we do not want to do is see roadblocks down the way where the administration says, "Oh, wait a second. Now we have a bill we would like to introduce." We need to get the cards on the table and see where we stand.

Dr. KORB. I can appreciate that. We do not propose to introduce our own bill. We have suggested modifications to Chairman Jepsen's bill, and if they are put into the bill, we could support it. That is our position.

Senator QUAYLE. Do you have any problems with the potential costs of the bill?

Dr. KORB. We do not know the cost of the bill. I indicated in my statement that there obviously is going to be administrative cost involved in the sense of finance centers having to make adjustments and mail different checks.

We do not know because it depends exactly on what the courts do. This bill, as I understand it, leaves it—in most cases—up to the courts to make the decision. It depends on how the courts make the decision.

Senator QUAYLE. So, you are saying that the only real costs are just administration costs, and those would probably be minimal in nature. Certainly, the minimal administrative cost would not come close to overweighing the inequity that was prescribed by the *McCarty* v. *McCarty* decision.

So, therefore we will not hear any opposition to this legislation because of costs, am I correct?

Dr. KORB. You will not hear any over costs in that sense—administrative costs.

Senator QUAYLE. Any other costs? I mean where in this day of budget resource—and you know the Defense Department is going to have to cut somewhere on their budget—I just do not want to go down this path and all of a sudden have this thing come back to you and say, "Well, if it costs this much we might want to reconsider this matter."

Dr. KORB. The other costs that we talked about were medical costs. We are concerned about that because the system is already overburdened and medical care is expensive. The other costs—our real concern—is the impact on retention of our people.

Senator QUAYLE. Do you think this will have a negative impact on retention of your people to the negative?

Dr. KORB. I think it could.

Senator QUAYLE. How.

Dr. KORB. What would happen, if it were, say, 5 years and you had an entitlement on the part of the divorced spouse, based upon the models that we used to project retention rates, we feel that would have an impact upon people in their second and third career reenlistment.

As I mentioned, we estimate that second-term reenlistment rates would decrease by about 5 percentage points and third term reenlistments prior to 20 years service would drop by as much as 20 percentage points.

Senator QUAYLE. What do you base that on?

Dr. KORB. We used the Center for Naval Analysis model to examine compensational alternatives, the same ones that we used to project the

impact of bonuses, for example, on retention rates and to show the affect of unemployment on retention rates.

Senator QUAYLE. You are saying you are going to have a 20-percent reduction in retention. In what area?

Dr. KORB. Of people in the third——

Senator QUAYLE. Third term?

Dr. KORB. Yes, third and subsequent.

Senator QUAYLE. How many years is that?

Dr. KORB. Normally the third term would be after 8 years.

Senator QUAYLE. You are talking about a 20-percent reduction.

Dr. KORB. It could be up to a 20-percent reduction.

Senator QUAYLE. Now, then, what is the divorce rates of these people right now?

Dr. KORB. We are assuming 50 percent, the same as the national average.

Senator QUAYLE. And is the national average the same as the military, or do military people have a tendency to stay together more?

Dr. KORB. It is about the same, as best as we can determine.

Senator QUAYLE. About the same. So, take a 50-percent divorce rate and you are saying a total of 20-percent reduction. That means that out of that 50 percent that would be getting divorced, that is about 70 percent of that, if I read those figures quite right. That is awfully high. If you take a total of 20 percent of the total, a 100 percent, and you drop that down to 50 percent, the people that get divorced, that cuts it in half.

But you are talking about 40 to 60 percent of the people will be using this as a factor.

Dr. KORB. What we are saying, Senator, based upon the models which are used for all our compensation initiatives, is that it could result in about 40,000 fewer reenlistments over the next 5 years.

Senator QUAYLE. Now, this model—you have my attention on this—is this from interviews or are these just hypothetical statistics that you are plugging into there? Do some of these people come and tell you, "Boy, if this thing is overturned by Congress we are not going to reenlist"? Have they said that?

Dr. KORB. As I indicated in response to questions earlier, we have had indications from people previously, before *McCarty* v. *McCarty* and since. The services now, when people leave, ask them the reasons for leaving. All these things are plugged into the model.

But again, remember, any model is only as good as the information you put into it. As I mentioned to Chairman Jepsen before, we do not know what the impact will be. It will depend on how the law is passed. It will depend upon how judges apply it because, as you know, you have various ways in which State courts handle divorce.

Senator QUAYLE. Now, then, if a man quits the military, isn't his private pension plan subject to the same thing that we are trying to do right here?

Dr. KORB. That is correct.

Senator QUAYLE. So, how can you say that this is going to change? If his military pension plan is going to be treated the same as it would be on the private side. I cannot see how that is any incentive. He is not gaining anything. There is no financial enhancement because

he is not going to get treated differently when he gets out there in the private world.

Dr. KORB. I think we are talking about two different things here. We are talking about a service member who, say, after 7 years gets divorced. The court says that the former spouse is entitled to 50 percent of what he earned or what his pension would be.

Senator QUAYLE. But that could be the case if he is in private life.

Dr. KORB. Now wait. The individual is not yet entitled to that retirement. If that individual leaves after 8 years, he gets nothing. That is the difference between many private pension plans and the military retirement system.

That individual has no vested rights in that system until he or she serves 20 years. What we are saying is that the individual, having served 8 years, says, "Well, if I continue to stay on," under Chairman Jepsen's proposal, it would not stop, as I read it, at the seventh year. They would continue to accumulate it. He would say that "somebody else is continuing to earn part of my retirement for the next 13 years and therefore I will get out."

Our proposal is that it stop at the time of the divorce. If they served 8, 10, or whatever the number of years, you would get your retirement based on that. The figures I gave you were based upon S. 1814, which does not have that.

Senator JEPSEN. Would the Senator yield?

Senator QUAYLE. I would be delighted to yield to my chairman.

Senator JEPSEN. Just for the record and, having been among other things in my life in the insurance business for a quarter of a century, if the statement that you made, indicating that there were no vested benefits in the pension after 8 years in the private sector were so, I would say that you would have a point debatable.

In the last 15 years, certainly even the last 20 years, it is practically impossible—today I guess it would be impossible, period—to have any type of private pension plan put into place that would not provide for if not immediate vesting, very early vesting. Most of them require now that they have to have vesting begin immediately. We used to be able to do a lot of things in pension plans, we could reward length of service and we could discriminate between the white collar and blue collar, we could do all kinds of things.

Those things, over the years, have been broken down and in the area of vesting that is not true today. I just want to put that in the record.

Dr. KORB. I think that supports my point—that vesting in the military does not ocur until after 20 years. In the private sector most of the time it is considerably earlier. That was my point, and that is the difference between the two.

Senator QUAYLE. You are talking about two different things. You are talking about vesting of rights, and I am talking about sharing in that investment.

Dr. KORB. I understand.

Senator QUAYLE. What I am saying is, if we overturn *McCarty* v. *McCarty*, as you say you want to do, there is going to be an ability to share in those pension rights—notwithstanding the vesting. I am not talking about vesting, that is another subject. What I am talking about is, at the time of divorce is that spouse going to be entitled to some of the equity over the years if in fact there has been vesting?

You are sitting here and indicating to me that 20 percent of the people with 8 years of service or more will not reenlist because of this potential of overturning *McCarty* v. *McCarty*, which allows the spouse to have some of those vested rights at a future date.

Yet I am saying if they get out into private life and have a private pension, they are going to have that division anyway. So, I cannot understand why this would be any kind of an incentive and have any kind of effect on reenlistment.

Dr. KORB. You asked the question: Does it have an impact? I am telling you that S. 1814 will have that impact.

Senator QUAYLE. What is the basis for it? When did you introduce this bill?

Senator JEPSEN. September.

Senator QUAYLE. This bill has been introduced and now 20 percent of your people with 8 years or more say they are not going to reenlist because of it? I have a very difficult time, in all due respect, believing that.

Dr. KORB. You asked the question, Senator, as to what would be the impact. I said that we used the same models on impact when you asked us the question, "If we raise the bonus by this much, if we raise pay by this much, what will be the impact?" We used those same models to come up with this system.

Then you asked me for an explanation and I said to you there is a difference between the military retirement system because if the individual leaves after 8 years, there is no retirement to which the former spouse is entitled. That is the difference. There is no money unless the individual serves 20 years.

Senator QUAYLE. So, that would be an incentive for him to serve.

Dr. KORB. No, it would not because of the fact——

Senator QUAYLE. He has to share.

Dr. KORB. That is right.

Senator QUAYLE. But when he gets on the outside and he has a private pension plan. If he gets divorced, he is going to have to share that too. That is my point.

Dr. KORB. I understand that, but what we are talking about is an individual at this particular point in his career—and military retirement compared to private pension retirement is much more generous in the sense that it allows the individual to retire earlier at a higher rate. There is a difference between the two. I do not think you can compare them.

That is the point I am trying to make. We are not talking about equity here.

Senator QUAYLE. That is also what I am talking about. I am talking about equity; I am talking about what he is going to gain. What is he really going to gain by leaving the military because of the pension problem with the ex-spouse? I do not see it. That is the point.

Dr. KORB. What the individual gains, if you will—and people who have been through divorces know there is a lot of bitterness. A lot of people do things that they would not ordinarily do in the course of their dealings with other people.

What the individual gains is this: He prevents the other party from getting something. That is one of the things that he gains, if you will.

We are not talking about the question of equity here. You asked me

what the impact on retention would be. I am telling you this is what the impact would be, as best we know.

Now is that the correct thing to do? Are those the types of people we want in the service? Those are different questions. But we are giving you the best information we have that you can consider in your deliberations.

Senator QUAYLE. I would certainly hope that we would not keep bandying about this figure of 20 percent.

Dr. KORB. No, I said 20 percent. The career reenlistment break, which is 80 percent, would be reduced.

Senator QUAYLE. I believe you said—and we can go back to check the record—I believe you said that there could be up to 20 percent of the third-year enlistment.

Dr. KORB. It would decline by 20 percentage points.

Senator QUAYLE. Yes, decline 20 percent. I mean, that is a huge number on a matter that I consider an equity, a fairness. You can get into the human side of it. They may want to prevent a spouse from getting something, but they really do not gain anything.

I just have a hard time believing that is really going to happen. I am sure you have a lot of statistics and maybe they will back that up. But I think there is a lot more to it than just a few statistics. I would implore you to be careful about using that kind of a figure, just based on statistics, when you are talking about a very, human element aspect.

Dr. KORB. I couched my remarks and told you the source on which they were based. We did this because the chairman asked us to do this. This is the best that we can do at this particular time.

How well it works depends on a great number of factors that I spoke about before. As you know, having dealt with these issues, the perception of a situation many times is more important than the reality. If there is a perception, for example, that the Government has broken faith with military people by changes in the retirement system, many times that has an impact all out of proportion to the actuality. People act on what they think is fair many times rather than the facts.

Senator QUAYLE. We are certainly not helping matters on perception if we are saying the Jepsen bill, if it is passed, is going to result in a 20-percent loss in retention. I mean, as far as perception, you are certainly not helping that at all.

Dr. KORB. Senator, that was not in my statement. I was asked for those figures, and I said to you, based on the models that we used, that this is the best estimate we can give you. We did not volunteer that. And if you take a look at my statement, I did not say that we are opposed to the Jepsen bill because you could lose those figures.

Senator QUAYLE. This is the thing that is rather intriguing, that you support the Jepsen bill, yet this data shows that it is going to have this adverse effect on retention. You are right; I think that perceptions are very important.

If you are going to come up and support a bill that is going to have an adverse effect of 20 percent on military retention, we are not doing anybody any good. I believe that it would be best just to drop that particular item and start talking about the Jepsen bill and get it moving.

Another question and then I will yield back. How many women are affected on this? Do you have a number?

Dr. KORB. Do you mean women as spouses?

Senator QUAYLE. Yes—how many spouses are affected by this?

Dr. KORB. By the Jepsen bill?

Senator QUAYLE. The court case. I mean, how many divorces do we have, and if you take all of the divorces, are all those—I guess you have to be of such and such an age to qualify.

I mean, how many women are affected by this court decision, a total, aggregate figure; do we have one?

Dr. KORB. This is the best I can do for you: There are about 3,000 retirements per month, 36,000 a year. The typical age of that group is 42.

At that age level, about 83 percent—approximately 30,000 per year—are married at retirement. Of that 30,000, about 14 percent or 4,000 can be expected to be divorced after having been married for 10 or more years.

Senator QUAYLE. How many, 4,000?

Dr. KORB. That figure is 4,192 for the retiring population only. We could expect about 4.000 new divorces per year among retirees.

Senator QUAYLE. So, basically, you are talking about 4,000 spouses per year.

Dr. KORB. Among retirees.

Senator QUAYLE. But those are the ones that are affected by this.

Dr. KORB. No; it would certainly be much more than that.

Senator QUAYLE. Then on this legislation, how many people are we talking about?

Dr. KORB. We have about 80 percent of our career forces married.

Senator QUAYLE. What percent?

Dr. KORB. Eighty percent of our career force. If we assume that they get divorced at about the same rate as the general population, 50 percent of those people will divorce at some time.

Senator QUAYLE. What I want is a figure on how many spouses will be affected by this.

Dr. KORB. You mean the potential impact?

Senator QUAYLE. Potential.

Dr. KORB. The career force would be about 1.2 million people, I would say, out of a force of 2 million. So, 80 percent of that, and 50 percent of that.

Senator QUAYLE. So, you are talking about 450,000.

Dr. KORB. Potential.

Senator QUAYLE. A potential impact of 450,000.

Senator JEPSEN. Would you yield?

Senator QUAYLE. Yes.

Senator JEPSEN. Dr. Korb, the majority of these divorces are going to come within the early years. I think your statistics will show that—I would bet a new hat without even seeing them; probably the overwhelming majority. Is that correct?

Dr. KORB. Would come?

Senator JEPSEN. In the early years.

Dr. KORB. That is correct. We can give you the exact figures.

Senator JEPSEN. Let us use as a first guidepost, if we may please, the 5 years. How many divorces occur during the first 5 years?

Dr. KORB. In the first 5 years the cumulative percent of marriages ended by divorce is about 19.2 percent.

Senator JEPSEN. So, we have 19 instead of 50. Now we move up, how about 8 years, since you are using that?

Dr. KORB. That is 28.5 percent.

Senator JEPSEN. You mean after 8 years there are more people getting divorced than between 5 and 8?

Dr. KORB. No; that is the cumulative effect. The difference between 5 and 8 years would be 9 percent.

Senator JEPSEN. I am glad that we are discussing this further. You say that there is about a 50-percent divorce rate overall in the Armed Services.

Dr. KORB. Well, overall population.

Senator JEPSEN. Of your 80 percent of people that are married, that qualify because of their position for divorce. So, this 50 percent. What part of this 50 percent takes place in the very early years?

Dr. KORB. We do not keep statistics on divorces in the military community. We are using the statistics for the population at large.

Senator JEPSEN. Oh, I thought all the time you were saying these were things that developed from your surveys.

Dr. KORB. No, the population at large, and we assume that our people are generally reflective of what happens in the population at large.

Senator JEPSEN. I do not think you have the figures, Dr. Korb, and I know that we do not. We are going to try to pursue them by way of interest of what percentage of the divorces occur before the 5-year point; what percentage of divorces occur at the 8, in other words, how many people, of all the divorces in the Nation, I guess. If you would answer based on the things you have been using.

You would have to be able to tell me how many divorces in the Nation occur during the first 5 years, and so on.

Dr. KORB. We can give you those for the population at large.

Senator JEPSEN. Percentagewise?

Dr. KORB. Percentagewise.

Senator JEPSEN. What are they?

Dr. KORB. After 5 years, 19.2 percent of the people who got married are divorced.

Senator QUAYLE. I would hope that we could get some sort of a figure that we might agree upon, I think that would be rather relevant to the discussion.

Dr. KORB. That is the figure that is furnished.

Senator JEPSEN. Well, of the 50 percent—we will try one more time. I do not think it is something we should get hung up on here in the hearing because I am not sure we understand.

Of the 50 percent of the people who get divorced ultimately, over their lifetime, what percentage of those are divorced in the first 5 years of their marriage?

Dr. KORB. It is 19.2 percent of the 50, so it is a little bit less, about 40-some.

Senator JEPSEN. A little less than half.

Dr. KORB. Yes; it would be about 38 percent of the 50 percent that occur in the first 5 years.

Senator JEPSEN. And then, if we moved up to 8 years, since that was the level figure you have been referring to, we are looking at, probably?

Dr. KORB. At 8 years, 28.5 percent. At 8 years more than half of those who are going to be divorced are already divorced.

Senator QUAYLE. I just have one final observation. I would hope that we would encourage marriages, encourage things going forward in a traditional sense. I would much prefer that kind of a discussion.

I would also hope that the bottom line will be one of equity. I think that equity and fairness is inherent in our whole moral and social, economic and political fiber of this Nation.

I have a young, unmarried lady in my office who has been working on this. She has asked the rhetorical question of whether in fact she should marry somebody in the service.

Dr. KORB. Do you want me to answer that? [Laughter.]

Senator QUAYLE. I think I will just leave it there rather than getting into a discussion on whether or not one should. But this is a rather intriguing observation that she made after working on this legislation and finding out some of the problems.

Thank you, Mr. Chairman.

Senator JEPSEN. In view of the *McCarty* v. *McCarty* decision, Senator, that is a fairly astute observation and question.

In conclusion, Dr. Korb, I have just one question and then we will ask for your closing remarks and comments.

You have been saying all along, as I understand now—to recap here—that you would be willing to support some form of bill as the Supreme Court indicated. That if there is going to be action, it should be taken congressionally as we proposed here, with some changes.

That you would be willing to turn it back to the State courts. But all along through our conversation and the question give-and-take here I have seen a thread woven through the fabric of your answers saying, you would be willing to turn it back to State courts but only with restrictions on the State courts which did not previously exist.

These restrictions seem to reflect a basic distrust of the State courts' ability to look out after the interests of servicemen. Is this distrust well founded, or do you have some statistics on that, that we do not know about?

Dr. KORB. One of the points I made—and Senator Denton referred to it in his statement—was that in certain States—counsel has advised me there are three such States—it is automatically included as community property; automatically divided without the question of equity or fairness or which party is at fault. In that sense there is no judicial discretion.

We are saying that unless there is judicial discretion, we do not want it to be involved. I think we both agree on that point. But Senator Denton pointed out that he is well aware because we have a situation in which a former POW in the State of California had his retirement pay automatically divided without any analysis of who was at fault.

We are saying we do trust the State courts, but in those three States it is our understanding they do not have discretion, and we would like them to have discretion.

Senator JEPSEN. I have discussed this, as you might well imagine, with some of my colleagues. It is just loaded emotionally on this particular instance about the POW—which makes you want to fight somebody because you just do not see there is any justice.

By the same token, you could make a case for the wife.

Dr. KORB. We agree.

Senator JEPSEN. She went around worldwide, held the family together, the POW came home and for whatever reason took off with somebody else. That has also happened, human nature being what it is.

As you well know, I am a strong supporter of the family as a basic unit and have suggested that we have some things positively and constructively that focus in on that. We have had enough "kinky" things go on over the years, we advocate all kinds of things that take away from these things and distract from them.

Along that line, not to be facetious or in any way trying to add some humor here at your expense, I wrote some notes while you were talking, having an exchange here with Senator Quayle regarding this 8-year retention thing. I am not a lawyer. Many times lawyers' diction gets hard to cope with, they lose me right away.

But what we really are saying here was that a man and wife, coming up for enlistment, are sitting down and saying after 8 years—whichever one was in the service—"Now, before I reenlist we should together speculate on the statistical probability of us having a divorce 12 years from now. If you are thinking about it, I want to know now before I reenlist. [Laughter.]

Dr. KORB. What we are talking about is the person who has been divorced. He or she is already divorced and they come up for reenlistment at the 8- or 12-year point. This would be a factor in determining whether they stay on until they get the retirement because under certain interpretations of the bill 50 percent of that retirement income would still be going to the former spouse; that was the point that I was making.

Senator JEPSEN. If they were already divorced that would be behind them.

Dr. KORB. That is the point.

Senator JEPSEN. So, I do not know that it would affect his reenlistment at all.

Dr. KORB. It would not be behind him in the sense that the individual does not receive entitlement to that retirement until he has served 20 years. He has to serve 12 more years.

The court may have already given that retirement, or up to 50 percent of that retirement, to another individual to whom that person is no longer married. That is the point we were making.

Senator JEPSEN. Do you have any further comments?

Dr. KORB. In way of a closing statement?

Senator JEPSEN. Yes.

Dr. KORB. I think quite rightly the questions here this morning have pointed up the dilemna we are talking about. The Department of Defense wants to have an equitable situation develop here.

We, like you, are concerned about the fact that courts in certain cases have not acted in the best interest of both parties, and this is what we both desire here.

We are trying to come up with a position and a bill that rectifies the equities as best as any law can, recognizing that it will never cover all of them on either side, and at the same time make you aware that this does have an impact on the decisions of people in the service depending upon how the law is passed.

We feel our modifications would eliminate most of the negative potential impacts in terms of retention.

Senator JEPSEN. And I do thank you for your contributions and—doing this just on a superficial basis—every one of these things we will consider. There are some that I think are helpful and strengthen the bill, as you pointed out, things that we missed.

I am pleased to hear, as I believe I did correctly hear and interpret, that you are supportive of, and the DOD feels that there should be some action taken because of *McCarty* v. *McCarty*.

Dr. KORB. That is correct.

Senator JEPSEN. Thank you.

[Questions submitted for the hearing record follow:]

QUESTIONS SUBMITTED BY SENATOR WILLIAM S. COHEN, ANSWERS SUPPLIED BY HON. LAWRENCE J. KORB, ASSISTANT SECRETARY OF DEFENSE (MANPOWER, RESERVE AFFAIRS AND LOGISTICS)

RECRUITING AND RETENTION INCENTIVE

Senator COHEN. Your testimony indicates your concern that the proposal to divide retirement pay could diminish the value of service retirement at a relatively early age as a major recruiting and retention incentive. On what do you make this assumption? Do you have survey data to support this assumption?

ANSWER. Our assumption is that a substantial portion of the force would perceive a potential loss of 50 percent of future retired pay. This would result in a 9–13 percent reduction in the present value of future military earnings for those mid-career personnel who would be affected. Based on compensation models which project reenlistment rates as a function of the present value of future earnings, we estimate substantial decreases in second term and career reenlistment rates. We do not have specific survey data to support this assumption.

FIFTEEN YEAR THRESHOLD

Senator COHEN. The Department's position on the requirement that a spouse or former spouse be married to a service member for as little as five years is that the number of years should be extended to 15 years. How did you arrive at that conclusion, and why, for example, would you select 15 years as opposed to five, or ten, or twenty years?

ANSWER. Fifteen years was selected as the earliest point at which we would not lose significant numbers of career members from the armed forces. Twenty years was considered too stringent a requirement as it would result in no relief for many deserving spouses. Then years, on the other hand, would result in too many losses of career members and was considered unacceptable from the point of view of force management requirements. We believe a 15 year threshold is imperative if career losses are to be kept at a minimally acceptable level.

DECREES ISSUED SINCE THE M'CARTY DECISION

Senator COHEN. I was pleased to note that you think that those decrees issued since the McCarty decision and prior to enactment of the bill which are amended by state courts should be enforced. How would you change the language of the bill to do that?

ANSWER. We are preparing a mark-up of S. 1814 which will provide the suggested language to implement all the modifications DoD considers essential for this bill. This includes the language you have requested to indicate all decrees should be recognized. The suggested change to implement the foregoing would be, on page 3 of the bill, at the end of line 2, striking the period and adding "and includes decrees issued prior to the effective date of this act." Of course, supporting statements in the legislative history also should be consistent with this change.

IMPACT ON EXISTING PROGRAMS

Senator COHEN. According to the March 15 issue of Army Times, any legislation such as S. 1814 which would permit the split of military retirement pay, could affect the "Catch-62" law. Have you looked into this, and what is the Pentagon's analysis of the impact S. 1814 would have on existing retirement or disability benefit programs?

ANSWER. We have not specifically looked into all the ramifications of the "Catch-62" situation. We recognize it already is a problem in certain circumstances even without this legislation. Additionally, it appears the drafters of the bill contemplated similar matters as certain items of compensation of a related nature would, under the terms of the bill, be deducted from retired or retainer pay in order to determine "net disposable retired pay" such as deductions required "to receive compensation under title 5 or title 38." (See page 3, line 19 of the bill.) With regard to disability benefit programs, amounts received as disability retirement under chapter 61 of title 10, United States Code, are also excluded. (See page 3, line 10, of the bill.)

SERVICE POSITION

Senator COHEN. Some have suggested that though DoD is testifying on behalf of this bill, the services may attempt to undercut efforts to win its passage. Do you think this is a possibility? And what would be the position of DoD toward the services if they were to make this kind of effort?

ANSWER. I do not know what the Services might do. As to the position of DoD toward the Services if they were to make this kind of effort, this would be a matter for the Secretary or the Deputy Secretary to decide, and I would defer to their good judgment.

TWENTY-YEAR ELIGIBILITY

Senator COHEN. An argument made by some organizations is that the only fair number of years of marriage for eligibility would be twenty, since that is how long the service member must remain in the military to be eligible for retirement benefits. What is your response to that argument?

ANSWER. We recognize that there is some logic in that argument. However, we believe that is too stringent a standard. Of course, where member does not remain in service and retire, neither the member nor the spouse will receive any portion of the retirement. We also believe that there is a distinguishable difference between the member's entitlement to retired or retainer pay and the limited diversion of that pay on behalf of a former spouse which this bill would permit.

MEDICAL CARE PROVISIONS

Senator COHEN. Do you know if the medical care provisions of this bill are included in any other similar law relating to divorced spouses?

ANSWER. We believe they are not. It is noted that there are permissive provisions in the Foreign Service Act of 1980 for extending health care to members of the family after divorce, but these provisions are different from those contained in this bill.

COSTS OF MEDICAL AND DENTAL CARE

Senator COHEN. What does the Defense Department project as the cost of providing medical and dental care under the terms of this bill?

ANSWER. We are unable to project such costs as we do not have information on the number of spouses divorced or separated from members and retired members. We do believe the costs could be substantial.

DISPARITY IN BENEFITS

Senator COHEN. Would this provision create any disparity in benefits between those provided for in this bill and spouses of service members or retirees?

ANSWER. It would not. It could, however, create a disparity between the benefits provided to a widow vis-a-vis spouses of service members or retirees. Anyone eligible for hospital insurance benefits under title I of the Social Security Amendments of 1965 is not eligible for health benefits under section 1086 of title 10, United States Code.

ADMINISTRATIVE COSTS

Senator COHEN. What does DOD project to be the administrative costs of implementing provisions of this bill? Could you break those costs down for the record?

ANSWER. Since we do not have precise figures or any way of anticipating how many former spouses would seek to avail themselves of the provisions of the bill, we are unable to project the costs of implementing the bill. We would expect, however, that operational and administrative costs could increase

significantly in the areas of processing court orders, adjudicating payments, resolving legalities of determinations, and overall operations. Further, such increases could be expected to expand in proportion to the number of instances concerned, and the execution of State divorce laws as they reflect rising divorce rates. Additionally, there are costs attendant to the implementation of the Survivor Benefit Plan election proposed as well as incident to the inclusion of the health care provisions.

QUESTIONS SUBMITTED BY SENATOR JEREMIAH DENTON, ANSWERS SUPPLIED BY HON. LAWRENCE J. KORB, ASSISTANT SECRETARY OF DEFENSE (MANPOWER, RESERVE AFFAIRS AND LOGISTICS)

SERVICE DISAGREEMENT

Senator DENTON. Secretary Korb, it has come to the attention of this committee that the DOD position on S. 1814 is not supported by the Service Chiefs. Would you outline those areas where the Department and the Service Chiefs are in disagreement?

ANSWER. I have presented the Department's position on S. 1814; it represents the Administration's position as well. It would be inappropriate for me to discuss the views of the Service Chiefs on this bill. My statement represents the Department's position and was provided in response to the Committee request. As I am not privy to all the considerations which have been relevant to the development of the Service positions, I believe that any further comments in this area would be inappropriate.

DEVELOPMENT OF POSITION

Senator DENTON. Given the fact that there is disagreement between the Department and the Services on this issue, would you explain how the Department's official position was derived and who were the major participants in the decision-making process?

ANSWER. The Department's position was reached after careful consideration of all relevant factors. These factors included retention; recruitment of prior-service personnel; family considerations; and, equally as important, what we believe are our obligations to members, spouses, former members, former spouses, the Congress, the public, and the public trust and confidence placed on the Department to provide adequate military forces to meet national defense objectives. Major participants to this decision-making process included representatives of the Service Secretaries and Chiefs of Services.

INCREASED THRESHOLD REQUIREMENT

Senator DENTON. Secretary Korb, S. 1814 provides accrued pension benefits to a former spouse after five years of "in-service" marriage. The DOD position would increase this requirement to 15 years. On what criteria is this position based? As we are all aware, military retirement benefits are not vested until 20 years. What I am attempting to determine from this question is whether the DOD position is based on careful study or an arbitrary estimation of what the "political traffic will bear."

ANSWER. The recommendation to increase the "threshold" to 15 years was based on an assessment that 15 years represented the earliest point during a member's career that passage of this or a similar bill would not impact on retention rates to an unacceptable level. At 15 years, the member has made a significant investment in the military career to warrant staying until eligible for retirement, so long as he or she will receive a substantial portion of it. Prior to the 15 year point, we are concerned that a divorced member whose spouse has a 50 percent interest in the retirement which will not vest for at least another five years will determine not to reenlist. Rather, employment will be sought in the civilian sector where, since the marriage has now been terminated, the full value of the civilian pension from the new employment will be to his or her sole use and benefit. Additionally, the former member would no longer be contributing to something which would partially benefit the former spouse.

TEMPORARY HEALTH CARE PROVISIONS

Senator DENTON. Secretary Korb, the Department of Defense opposes the temporary health care provisions for former spouses contained in S. 1814. Since the purpose of this legislation is to enact equitable solutions to problems resulting from existing law, some form of grace period, or provision for treatment of pre existing conditions, does not seem inconsistent with our intent. Can you tell us what the nature of the Department opposition is, and if it is cost, can you provide analyses supporting the Department's position?

ANSWER. The Department opposed the inclusion of the health care provisions in this bill for two reasons. First, it would provide for health care within the military system which is already overburdened. If medical care is to be provided to former spouses, we believe it should come from other non-military sources. Secondly, we believe this matter should be the subject of separate legislation addressing health care only and not as a part of S. 1814. The subject is very complex. Our objections at this time should not be construed as an objection to the concept involved, as we believe it merits thorough examination. Rather our objection primarily is focused on including health care in this bill. There will be increased costs in addition to the normal costs of administration and they could be substantial particularly where care is extended for pre-existing conditions. However, as we have no figures on which to base an estimate, we cannot provide any cost data.

QUESTIONS SUBMITTED BY SENATOR J. JAMES EXON, ANSWERS SUPPLIED BY HON. LAWRENCE J. KORB, ASSISTANT SECRETARY OF DEFENSE (MANPOWER, RESERVE AFFAIRS AND LOGISTICS), AND ROBERT I. GILLIAT, ASSISTANT GENERAL COUNSEL FOR MANPOWER AND HEALTH AFFAIRS

STATE LAW GOVERNS

Senator EXON. Dr. Korb, early on in your statement you commented that "The Department of Defense has always considered domestic relations matters to be primarily governed by state law, through state courts." And I believe the Army recently indicated to you that "state courts are the proper forum for evaluation of equitable decisions in divorce settlements." Yet the changes to Senator Jepsen's bill that you are advocating—which have the effect of further restricting and limiting the powers of state coutrs with respect to military retired pay—do not, in my view, demonstrate the level of faith in the equanimity of the state court process that you and the Army seem to proclaim. How do you reconcile the state courts being the "proper forum for evaluation of equitable decisions" with proposals to remove or limit some of that equitable decision-making authority when it comes to military retired pay?

ANSWER. We believe the State is the proper forum to resolve questions relevant to the dissolution of a marriage. However, and as recognized by the basic bill, the summary statements made at the time of its introduction, and the comments of this committee during these hearings, the Federal preemption and interests involved indicate that, in this area which impacts on national defense and the maintenance of adequate military forces, we do not believe that the state courts can be given unfettered discretion. Our primary aim is balancing this overriding Federal interest with the interests of all the parties concerned. It is not our intention to take sides in this matter with a view toward benefiting either of the parties of the marriage over the other except as required solely to meet national interests and objectives. Obviously, these limitations and conditions may prove more beneficial to the members than the former spouses but it is the members that are required to maintain effective Armed Forces. That factor cannot be overlooked. To delegate this matter totally to State courts we believe would frustrate the congressional mandate and our responsibilities to maintain adequate Armed Forces.

EFFECT ON RETENTION

Senator EXON. Dr. Korb, one of the arguments that I have heard raised against altering the McCarty decision is that subjecting military retiring pay to division in divorce proceedings could have some deleterious effects on retention of military personnel.

You discuss this argument in your statement [Korb Statement page 4]. Of course, state courts had been dealing with military retired pay for some time prior to McCarty; there are California court decisions on military retired pay going back to the early 1940s. And federal law currently permits garnishment of military retired pay in certain instances.

Dr. Korb, have you seen any credible, objective studies—based on prior or current experience—supporting the argument that merely overturning the McCarty decision would undermine military retention? As a practical matter, do you believe a military member would forego the opportunity to get at least 50 percent of his retired pay because his wife might get a portion of it—especially in view of the fact that your retired pay from some other form of employment also could be vulnerable?

ANSWER. We appreciate that courts have been dealing with military retired pay for at least 40 years. It was limited, however, to only a few jurisdictions and, because of the uncertainty as to the authority to do so, even within those jurisdictions, it was not necessarily being applied in all cases. Divorce also was not as prevalent 40 years ago as it is today. Our concern now is that any action to undo McCarty will be seen as a clear signal to all the states that military retired pay is available for distribution upon divorce, and we will no longer see this issue limited to just a few states. The attendant publicity has also brought this matter into sharper focus. Where a member is divorced at some point during a career, the future retirement picture will be reevaluated if a portion of the anticipated retirement would be diverted to the former spouse. If the member continues in the service and the former spouse will eventually obtain a portion of the retired pay, the member will look to civilian alternatives to improve the situation. This is a real concern. Where the marriage is already dissolved, the member who leaves the military and obtains civilian employment can preclude the former spouse from any claims to the new pension plan. Considering what a member would have to pay to a former spouse out of a military retirement, a major incentive to complete a service career is lost if one can do better in the civilian sector. That is our concern. We believe, therefore, that it is imperative from a force-manager's point-of-view to ensure that there will always be sufficient retirement available for the benefit of the member to encourage remaining until at least retirement eligible or thereafter.

STATE COURTS LONG DEALING WITH MILITARY RETIRED PAY

Senator EXON. Dr. Korb, the Supreme Court handed down the McCarty decision on June 26, 1981. Prior to that decision the state courts for many years had been deciding how military retired pay fit into the scheme of state divorce property laws. Indeed, the decisions in California go back into the early 1940s. Prior to McCarty I am not aware of a perception—on the part of the military services or Department of Defense in general—that the state courts needed to be substantively restricted in the way that they dealt with military retired pay in divorce proceedings.

Your suggested changes to the Jepsen bill suggest that such a perception exists now. In your view, do you think that the state courts are now unable or unwilling to analyze all the facts and give the service members a fair shake?

ANSWER. Prior to McCarty, only a few states divided retired pay. The issue had not been joined and relatively few people paid any significant amount of attention to it. McCarty has brought the issue into focus. With the attendant publicity, all members, spouses, former members, and former spouses are watching to see what happens. Since McCarty also provided a basis to terminate or modify existing decrees, many former spouses are left in a worse position than before. We also understand certain courts are reacting to McCarty by making "offsetting" awards of alimony which can also be unfair to non-career members. To reverse totally the effects of McCarty will, under the present circumstances, have an adverse effect on force management as it is anticipated most states would avail themselves of the new provisions. What we are talking about is not a "fair shake" to the member or spouse, which we believe is accomplished in most cases by the appropriate state courts, but rather the paramount federal interest in maintaining an adequate Armed Force. To do so effectively requires that certain safeguards be provided to protect overriding federal interests, although these same safeguards regretably may be construed to benefit one party more than the other.

FEMALE PENSION EARNER

Senator EXON. Dr. Korb, I am sure you realize that there are more and more women today who are pursuing careers themselves. Others continue employment to make an economic contribution to their marriage and family. Some of these women may go on to earn pensions or retired pay of their own. Under the changes you propose a female pension earner married to a military member could have no right to any portion of the former member's pension, while the member could receive some major portion of his wife's or husband's pension. Do you think this is a fair and equitable system? If so, please explain why.

ANSWER. We concur that it would not be fair for a member to share in a spouse's while the spouse could not share in the member's retirement. However, this is a matter which may be easily rectified by the states changing their laws. In this same regard, we believe it is essential that state courts be able to exercise discretion before applying the provisions of this bill. We support the proposition that equity is the ultimate goal the bill seeks to achieve, and that it should be tempered only by factors considered imperative to meet the needs of effective force management.

CONSISTENT PERCENTAGE LIMITATIONS

Senator EXON. Dr. Korb, if we are going to limit the percentage of military retired pay which can be used to satisfy court orders, is there any reason why the percentage limitation in this statute should not be consistent with the limitation in the garnishment statute [42 U.S.C. 659]? What is that reason, and explain.

ANSWER. We believe the percentage limitations contained in this bill are essentially consistent with the garnishment limitations. Garnishment, however, allows higher amounts to be enforced for the collection of certain arrearages. S. 1814 has no similar provision and relates to prospective payments only. The differences in the purposes of the two provisions are substantial when one considers that S. 1814 is a compliance bill and garnishment is an enforcement mechanism for noncompliance with an existing court order. Under these dissimilar circumstances, we see no reason that the amounts need be the same. In fact, in view of the differing purposes, we believe that the higher limitations to collect certain arrearages particularly of child support and also for alimony under the garnishment law are appropriate for those purposes just as the 50 percent ceiling computed at the time of the court order for diversion of retired pay in appropriate for this bill.

REMARRIAGE CUT-OFF

Senator EXON. Mr. Gilliat, the Department suggests that "the enforcement provision should terminate upon the remarriage of a former spouse." [Korb Statement, page 5.]

Does the Department want the right [included in the court order] to receive payments also to be cut off by remarriage or just the obligation of the Department to enforce that right?

ANSWER. We believe that upon remarriage, the obligation and the enforcement should terminate. This is consistent with our position that, with the exception of the limited diversion of retired pay authorized under proposed section 1408, military retired pay remains the personal entitlement of the member. We believe it inappropriate to get "hung-up" on labels. Although the bill would allow the states to consider military retired pay as property for the limited purposes indicated in the bill, we do not consider it should be characterized as property for any other puposes. We basically consider the bill as an effort to fill a void in state laws, particularly where there is no provision made for alimony payments. This is consistent with the bill and current tax laws which treat military retired pay as income for all other purposes. It is essential to retain this characterization if we are going to be able to maintain adequate Armed Forces.

Senator EXON. Are you aware whether any state property laws [or applicable decision] dividing or distributing military retired pay as property provide for an automatic cut-off of that distribution upon remarriage of the recipient spouse? If so, what states?

ANSWER. We are not aware of any states that cut off distributions of property upon remarriage. What we are suggesting here is creating a "fiction" that retired income, for the purposes of this bill and only this bill, may be considered property under states statutes governing the distribution of marital assets as the result

of a divorce. For all other purposes, due to overriding federal interests, it remains an income entitlement.

Senator EXON. In your legal judgment, is a remarriage cut-off consistent with the treatment of military retired pay as "property?"

ANSWER. Termination of retired pay upon remarriage of the former spouse may not be consistent with traditional "property" concepts. It is consistent, however, with military retired pay as the personal entitlement of the member being characterized as income except for the very limited diversion permitted under this bill.

Senator EXON. Are the enforcement provisions of the garnishment statute automatically cut off by remarriage?

ANSWER. No, they are not. Garnishment normally relates to past due amounts of indebtedness, or arrearages, and may continue to be enforced to collect alimony or child support.

TREATED AS ENTITLEMENT OF THE MEMBER

Senator EXON. Dr. Korb, you state [on page 5–6] that "it clearly should be reflected [in any legislation] that military pay in spite of the diversion to a former spouse that would be permitted by this bill, remains the personal entitlement of the member." If that is the case—and the spouse is not to have any property right in military retired pay—exactly what is she getting, just another form of alimony?

ANSWER. You could characterize the diversion permitted under this bill to a variety of ways. We think it inappropriate, however, to get affixed to labels. This bill is an effort to fill a void in state laws, particularly where there is no alimony. It also seeks to provide for prospective payments without having to resort continually to garnishment, as it is normally used for arrearages, must be periodically renewed, and is frequently a costly procedure. This could be changed in state law, and perhaps more appropriately should be. However, since a change in federal law is being considered, we have proposed certain modifications to the bill which we consider are essential if we are to be able to maintain adequate Armed Forces within realistic budgetary constraints.

FIFTEEN YEAR PROVISION/PERCENTAGE LIMITATION

Senator EXON. Dr. Korb, you would require a spouse to be married to a member or former member for "at least fifteen years during which period the member performed at least fifteen years of creditable service." The Department also advocates limiting the retired pay susceptible to court orders to 50 percent of disposable retired pay computed as if the member could retire at the time of the final court order.

Dr. Korb, in your view, are the state courts incapable of equitably determining the impact of the length of a marriage on how retired pay should or should not be divided? Have not those courts been making those types of decisions for a number of years?

ANSWER. We certainly have no intention on casting aspersions on state courts in the resolution of matters involved in the dissolution of a marriage. However, we are concerned that an appropriate balance be maintained between equity and respect to the parties to a divorce and the maintenance of adequate Armed Forces. Our concern, clearly, is that equity in the view of a state court between the parties involved in a divorce may leave us with unacceptable results with regard to maintaining adequate Armed Forces. By using federal preemption prerogatives, we believe that certain limitations will preclude state courts from thwarting the ability of the United States, the Congress, or this Department to meet national defense objectives. It is solely for the purposes of force management, however, that we believe certain restrictions must be placed on the authority given to the states courts in the resolution of these matters.

Senator EXON. Similarly, cannot the state courts be trusted to account equitably for the interests of the member or former member in determining what percentage of his retired pay should be awarded to the spouse? Why not?

ANSWER. We believe the state courts can account equitably for the interests of the members and former members, and in fact do in the bulk of the cases. Our concern, however, goes beyond this equitable accounting for the member or former member and is directly related to its impact on effective force management and the ability to maintain adequate Armed Forces. In this regard, equity solely between the parties involved in the dissolution of a marriage may have an adverse impact on effective force management. It is on ths basis that we believe federal preemption prerogatives must be exercised only to the limited extent required to meet or satisfy the federal interests and concerns involved.

STATE COURTS WITH INFLEXIBLE SYSTEMS

Senator EXON. Dr. Korb, you state on page 6 of your statement, "State courts bound by inflexible distribution or allocation requirements mandated in state law should not be authorized to make a distribution of the military member's retired benefits without regard to fault, need, or other equitable considerations."

You indicate that there are three states [Washington, Louisiana, and California] which have such systems.

Are you saying that we should leave the McCarty decision in effect for those three states?

ANSWER. Because our position is that McCarty would remain in effect except for the limited diversion of retired pay pursuant to this bill, that would be the effect. We recognize that enactment of such a provision may encourage those states to change their laws and avail themselves of the additional limited authority this bill would provide.

Senator EXON. If so, are we not going to encourage the same kind of forum shopping—that former spouses have been accused of on the part of members or former members seeking to shelter their retired pay from judicial reach in divorce proceedings?

ANSWER. We do not believe this encourages forum shopping by the members. In this regard, we determined that to preclude this very argument, that jurisdiction should not be limited to domicile or residence alone, but also include the place of marriage or where the member consents. In many cases, this will be the home state of the former spouse and, we believe, if jurisdiction over member is obtainable under that state's laws, those courts should also be able to determine matters involved here.

PROSPECTIVE APPLICATION

Senator EXON. Dr. Korb, in your statement [page 6] you "endorse the concept that the bill should have only prospective application and not include arrearages." You go on to state that "further clarification of the statutory language should be provided . . . to reflect that state court decrees issued prior to enactment of the bill may be enforced."

Are you saying that the limited removal of McCarty in the bill only should apply to divorces after the date of enactment?

If so, are we not going to promote a race to the courthouse by members or former members to get a divorce where their retired pay will be subject to the protections of the McCarty decision?

Should not this legislation seek to put the law back—with whatever limitations we decide—to what it was just before McCarty was handed down? Those who had been divorced or separated since McCarty and before passage of this bill then would have the opportunity to go back to state court to obtain whatever relief might be granted.

ANSWER. We are not suggesting that this bill provide relief only for divorces occurring after enactment. We recognize that decrees remain valid unless modified or set aside by the issuing court or a higher court. Decrees, therefore, should be enforceable whether issued before or after enactment or the McCarty decision. Decrees resulting from divorces finalized before or after enactment of the McCarty decision should also be enforceable. In view of McCarty, however, no decrees issued after that decision and prior to enactment of this or similar legislation should include retired pay as the Supreme Court reiterated it is the personal entitlement of the member.

This decision has already set the stage for running to the courthouse. Any decrees modified as a result of enactment of this or a similar bill we believe also should be enforced. McCarty didn't change the law—it merely settled the issue of what the law is. As indicated, we consider that decrees valid on their face should be enforced and that it be incumbent on the parties involved to seek relief from the courts if they consider it appropriate. Many times, a decree is not challenged out of choice or other resolution amicable to those involved. We have no way of knowing and consider it inappropriate to get involved in the middle of this kind of issue. That is for the courts to resolve. Again, our position is that all decrees from all divorces should be enforced if valid on their face.

CONSTITUTIONALITY

Senator EXON. Mr. Gilliat, are you satisfied that a statute which limited the ability of the state courts to classify what constituted community or equitably

distributable property under the applicable state law would withstand constitutional scrutiny—under the 10th Amendment, for example?

ANSWER. We believe it would withstand such scrutiny under the federal supremacy clause of the Constitution. McCarty makes clear that the federal characterization of retired pay as a personal entitlement of the military member is something which the states must assent to and cannot change. In this vein, since Congress clearly has this authority to determine the characterization of military retired pay, we can provide authority on a restricted basis to permit within certain specific circumstances for a limited diversion which would not be inconsistent with the Federal obligation to protect the military pay and retirement system. Since the action contemplated by this bill is being tempered for these interests, we see no problem in this area. We believe all or a part of it may be diverted or subjected to legal process are clearly Federal matters and absolutely required to preserve overriding federal interests.

LIMITED ENFORCEMENT OF DECREES

Senator EXON. Mr. Gilliat, the Department is advocating limiting enforcement of orders to those decrees issued by a court in a state in which the member is domicilied, resides, was married or in which he consents to the jurisdiction of the court.

First, is it the intent of this change to limit the recognition given to orders granted by state courts which obtained jurisdiction—to grant a divorce—consistent with the "minimum contracts" test set forth in McGee Internationl Life Insurance Company, 355 U.S. 220 [1957] and International Shoe Company v. Washington, 326 U.S. [1945]. For example, even if some prior period of residence in a state were sufficient to satisfy the minimum contracts rule under existing law, the Department's position would not permit enforcement of that order.

ANSWER. We believe that before a court or a non-member spouse should be able to avail themselves of the provisions of this bill, the action must be brought in a court of the member's domicile, residence, place of marriage, or where he consents. This is in addition to the requirement that the court have or obtain personal jurisdiction over the member. It is not the intention to give a court jurisdiction independent of its own procedural rules, but rather to limit the forums available if a party desires to avail themselves of the provision of this bill. As a practical matter, however, we believe this limitation is not incompatible with the "minimum contact" test, as applied generally.

Senator EXON. Second, are the jurisdiction to grant the divorce and distribute the pension always one and the same. If the former spouse files suit, does not the divorce court ordinarily look to the state in which the property was acquired to determine its characterization as marital property, community property or separate property? Does not this rule provide the member or former member all the protection against forum shopping to which he should be entitled?

ANSWER. The court granting the divorce usually makes the distribution of property—particularly real and personal property within the jurisdiction of the court—but this may not always be the case. Additionally, many courts have adopted a policy of treating all property as if acquired within the court's jurisdiction. This is true particularly in certain community property states where property, acquired either outside of the state or under circumstances that, if acquired within the state, would be community property, is treated as "quasi-community property" and local rules are applied to it. Obviously, a court can compel disposition of property within its jurisdiction a lot easier than property that is without. Because of the application of different conflicts of laws principles depending on the peculiar facts involved in any given case, we do not consider that there is adequate protection against forum shopping. To date, the courts have not expressed a universal opinion as to even what the situs of a military retirement is and this poses an additional problem as the federal government is omnipresent in all states.

Senator EXON. What protection do the Soldiers' and Sailors' Civil Relief Act [50 U.S.C. 3500–540] afford the member or former member in a divorce proceeding?

ANSWER. The Soldiers' and Sailors' Civil Relief Act protections really only involve staying proceedings when a court otherwise has jurisdiction over a military member. The stay proceedings are discretionary with the court and can be obviated by the court taking certain additional actions to prevent undue prejudice to a party. These include appointing counsel to represent the member's interests and also allowing a member to set aside a default judgement or reopen a case if warranted by the circumstances. The Act does not provide any restraints

as to the exercise of jurisdiction by any court over a member or indicate that only certain courts may obtain such jurisdiction. It is used normally to stay proceedings in which the court has obtained proper jurisdiction.

INTERRELATIONSHIP BETWEEN GARNISHMENT AND NEW AUTHORITY

Senator EXON. Dr. Korb, do you agree that, so long as some portion remains of whatever pool of retired pay [50 percent or otherwise] is to be susceptible to court orders, garnishment or orders under this legislation should be enforced?

ANSWER. There are legitimate reasons for leaving garnishment authority intact. Many former spouses, other parties, or welfare agencies cannot use this bill as it limits payments to former spouses who meet the indicated threshold. Our modification is to ensure that court orders enforced under this bill and garnishment statutes, when added together, do not take all of a former members retired pay. We believe the changes we have suggested to the bill will accomplish this result and essentially leave the independent authorities intact to the degree considered appropriate.

RESOLVING CONFLICTING ORDERS

Senator EXON. Dr. Korb, do you support the Service Secretaries donning judicial robes and functioning as a court of last resort where they receive conflicting court orders? See Section 1408(d)(3) of S. 1814.

ANSWER. We would prefer that the Secretaries be able to avoid the necessity of making such decisions, but note that this was included in the bill as drafted. We also think this possibly provides more equity than the provisions under the garnishment laws which provide that where there are conflicting court orders, payments are suspended to all parties until the issue is resolved. We have no preference as to either method but believe that this bill's provisions may preclude the possibility of some hardships and also encourage the parties to resolve the matters through the courts if they are dissatisfied with the action taken. Of course, if they are satisfied, the procedure facilitates making payments.

OTHER BILLS

Senator EXON. Dr. Korb, you are testifying that you do not oppose S. 1814, with some suggested modifications. But is there one of the other bills pending before his committee which you would prefer or do you oppose all other other pieces of legislation? What is the basis for your opposition in the case of each bill?

ANSWER. We are testifying that we do not oppose S. 1814 if modified as we have indicated. The Adminstration, and the Department, do not have a position on any of the other bills and we believe it appropriate at this time to limit ourselves to consideration of S. 1814.

MECHANICAL DIVISION OF PROPERTY

Senator EXON. Mr. Gilliat, the Department's position expresses concern over those states in which the courts are bound by inflexible distribution or allocation requirements.

Is it not true that even in these community property states where there is a 50–50 split of community property the court looks at the number of years the couple was married while the individual was earning retired pay in the military. See In Re: Fithian, 517, p.2d 449. [197]. Does not this also mean that the court would equitably consider the length of the marriage in determining the amount of any retired pay which should be awarded?

ANSWER. The length of the marriage is considered but state courts should look at all matters in determining equity for members and former members of the armed forces. However, not all can or do. Additionally, where members from non-community property states are transferred into community property states, there is nothing to prevent the court from applying "quasi-community property" rules to treat property acquired before coming into the state but after marriage as community property. Although this may still occur to a limited degree with our suggested modifications, we believe our modifications create a far more equitable situation for all concerned than would the imposition of arbitrary rules that prevent the consideration of varying factors in each case that may require a flexible allocation of marital resources.

Senator JEPSEN. The meeting is adjourned.

[Whereupon, at 11:45 a.m. the subcommittee adjourned, to reconvene subject to the call of the chair.]

UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT

THURSDAY, APRIL 29, 1982

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE ON MANPOWER AND PERSONNEL,
Washington, D.C.

The subcommittee met in open session pursuant to notice, at 2:10 p.m., in room 224, Russell Senate Office Building, Senator Roger W. Jepsen (chairman) presiding.

Present: Senators Jepsen and Cohen.

Staff present: Anthony J. Principi, counsel; Paul C. Besozzi, minority counsel; Richard D. Finn, David S. Lyles, José E. Martinez, professional staff members; Ralph O. White, research assistant; and Jacquie S. O'Grady, staff assistant.

Also present: Jim Dykstra, assistant to Senator Cohen; Jon Etherton, assistant to Senator Jepsen; Paul Schreiber, assistant to Senator Denton; Dave George, assistant to Senator Denton; Jim Cantor, assistant to Senator Goldwater; Don Imgram, assistant to Senator Quayle; Gray Armistead, assistant to Senator Byrd; Greg Pallas, assistant to Senator Exon; Jean Streeter, assistant to Senator Cohen; and Bob Griffith, assistant to Senator Nunn.

OPENING STATEMENT BY SENATOR ROGER JEPSEN, CHAIRMAN

Senator JEPSEN. The Subcommittee on Manpower and Personnel will come to order.

The Subcommittee on Manpower and Personnel convenes today to continue in its series of hearings on the issues related to the Supreme Court's decision in the case of *McCarty* v. *McCarty*.

It is my pleasure to welcome before the subcommittee today Lt. Gen. Andrew Iosue, U.S. Air Force, Deputy Chief of Staff for Manpower and Personnel; Lt. Gen. Edward J. Bronars, U.S. Marine Corps, Deputy Chief of Staff for Manpower; Vice Adm. Lando W. Zech, Jr., Deputy Chief of Navy Operations (Manpower, Personnel and Training); and Maj. Gen. William L. Webb, Jr., U.S. Army, Assistant Deputy Chief of Staff for Personnel.

On behalf of the members of the subcommittee, I extend our appreciation to each of you and your staffs for your efforts to accommodate the subcommittee with your written statements and your testimony this afternoon.

I recognize the controversy and the emotionalism surrounding the *McCarty* decision and the difficult position that you are in as a result

of trying to reconcile your service's views with that of the Department and in some cases your own.

I am confident you also appreciate the difficult task of confronting each member of this committee and the importance of obtaining the facts necessary to discharge our responsibilities.

As I mentioned in a previous hearing, we cannot proceed on supposition and inaccurate statistical data. It is simply too important an issue.

Recently DOD conducted an analysis of S. 1814's effect on retention. In their analysis DOD chose to assume that one-half of all active duty personnel, that is over 1 million service members, would be directly affected by S. 1814, and that in every case the ex-spouse would automatically receive 50 percent of the service member's retirement pay. Nothing is further from the truth. Even without the slightest research, how could anyone make those assumptions and then direct they be used.

Subsequently, the subcommittee received official testimony concerning this data in open session. It is this type of totally inaccurate data and distortion of the facts that fuels the emotionalism and creates fear and uncertainty among our forces.

For a great many years prior to the *McCarty* decision, State courts to varying extents and in accordance with their laws considered military retired pay when fixing the property rights between the parties to a divorce. During this period how did State court action alter the fundamental character of military retired pay? What effect did it have on recruiting and retention? Did the Soldiers and Sailors Civil Relief Act and the traditional conflict of law rules, as they pertain to domicile, provide adequate protection to the service members?

Perhaps in this regard I should point out for the record that Colonel McCarty, not his spouse, initiated a divorce action in California, a community property State, even though he could have filed for divorce in Oregon, his domicile. He had a choice.

Having filed suit he specifically waived his domiciliary protection and invoked the jurisdiction of the California courts. Had Colonel McCarty chosen to do other than start the action in California, or if his spouse had initiated the divorce, he could have claimed, as could all other service members, that his transfer under military orders did not alter his domicile and therefore his property was not subject to division under the California law.

Is it necessary that the Congress take further action to insure that all States afford resident service members protection from forum shopping? What evidence exists which indicates that service members are not being protected?

In addition to the pre-*McCarty* consideration of military retired pay, I believe it is important to address how the States are reacting to the *McCarty* decision and the impact, if any, on our force management.

In March of this year the District Court of Appeal of Florida upheld a lower court award of permanent alimony to the wife, a sum equal to one-half of the net retirement pay that the husband receives from the U.S. Air Force.

The court further held that the sum shall be a charge against his estate to the extent that his estate receives any death benefits attributable to the husband's retirement upon his divorce. This award could

just as easily have been 75 percent or 100 percent of the service member's retired pay.

So I would suggest that it appears to me that S. 1814 provides greater protection to the service members in many instances. That is a fact. Will individuals refuse to accept orders to Florida and other States that take similar action? In certain community property states, such as California, alimony awards, which become effective on the date of the divorce decree, and not at retirement, have increased significantly.

In view of the fact that division of retired pay is seldom a factor in marriages of short duration, how is an increased alimony payment in the best interests of our young service members?

It is my hope that this afternoon's hearing will afford us the opportunity to address these questions and to hear your views on how the Congress can resolve the problem in an equitable manner. I have noted that in each of your statements you all begin by stating that your service recognizes the contribution made by the military spouse, that a problem currently exists and the need for an equitable solution exists. So in principle we start by agreeing. Let's find a fair solution.

Gentlemen, your written statements will be made a part of the record and, after recognizing my colleague, Senator Cohen, we will come back and you may then proceed as you wish.

Senator COHEN. Thank you, Mr. Chairman.

I just have a few comments to make since I would like to hear from the people who are here today.

I suppose in part their appearance is as a result of a question I asked Mr. Korb at our last hearing. I asked what was the official opinion of the individual services and he at that point, rightfully I think, declined to comment. But the impression may have been created that I was laboring under some misapprehension that the services actually supported this initiative when in fact I knew the services were quite opposed to it.

The reason I wanted to have this opportunity to have the services come forward was to allow them to put on record the nature of their objections to the bill, the basis for them, the empirical evidence that they have accumulated to substantiate their conclusions that this may in fact impede or retard or in some way diminish their retention of qualified personnel in the services and to discuss as fully as they can in open hearing so we can have the record when we go to the floor with the bill as to the nature and the validity of the complaints that have been raised and whether in fact they are more illusory than real.

So in a way I think that I may have been responsible by asking a question which appeared to create to the audience perhaps that the services may have been in favor, and I know quite clearly that they are opposed to it.

But I would simply like to raise this issue that I still maintain that pension benefits, retirement benefits are a property right and that I believe that a wife does in fact contribute to the accumulation of assets, whether we call it a house or a car or any sort of household property. That is something that I think the courts have traditionally been quite fair in administering. I think they are quite competent to do so. There is a suggestion in some of the written testimony that somehow we should not convey to our military personnel that we will leave

it up to arbitrary decision as to what is going to take place with that pension.

I don't know why we would even suggest that the courts to date have been arbitrary as such. Our judicial system is not predicated upon being whimsical or arbitrary, but rather is founded upon the notion that it is fair and impartial and committed to the pursuit of due process.

So, Mr. Chairman, I will save whatever questions I have, but I am really interested in finding out what kind of empirical evidence that we would have as to what, for example, were the retention rates prior to the *McCarty* decision. In other words, was there some empirical evidence to indicate that people stayed on because they were under the belief that that pension right or retirement benefit would not be divisible and would not be subject to being divided by a court? What empirical evidence do they have to date that if in fact Congress does reverse the *McCarty* decision that this will change existing practice? I would be interested in finding out the basis of that apprehension.

Thank you.

Senator JEPSEN. Thank you, Senator.

General Iosue, you may proceed.

STATEMENT OF LT. GEN. ANDREW P. IOSUE, U.S. AIR FORCE, DEPUTY CHIEF OF STAFF FOR MANPOWER AND PERSONNEL

General IOSUE. Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear here before you this afternoon.

I have submitted a statement for the record, but I won't read from that. I will make some informal remarks with your permission.

The Air Force believes we do need a form of legislation. The complaints of our former spouses are valid and there are many, and you, as well as I, have read and heard many of the horror stories which exist. There is a great deal of injustice in the terms of the settlement, the inability to collect and the lack of medical care. As we address these issues, as you have mentioned, it becomes a very complex and a very emotional issue.

Therefore, any legislation considered must be fair and equitable, as you have stated, to both parties, both the member and the ex-spouse. I believe S. 1814 is a conscientious attempt to provide the solution to much of the injustice and many of the problems.

I do have some concerns, and one of them is that retired pay is subject to property division. I think and I believe that the implications of doing that must be considered. One of the implications in doing that is the effect it has on our retirement system.

Retired pay and the retirement system is an important force management tool. It provides a basis for mobilization. It provides for a standing pool of well qualified, experienced individuals who may be called upon at any time in the event of a national emergency. All may be recalled. We don't have plans to do so at this time. We have some 450,000 in this pool and we probably would recall somewhere between 85,000 and 100,000.

In addition to retired pay providing us the ability to mobilize, it does provide us institutional support, in addition to pay and compensation. It is a form of pay for the individual, the extraordinary de-

mands we place upon our members, the separation, the frequent moves overseas subject to assignment and in a hostile environment if necessary. So it does provide institutional support for our military members.

Retired pay is also a very powerful factor in retention. In fact, a recent survey conducted by the Air Force indicated that the No. 1 incentive for remaining in the Air Force as a careerist was our retirement system.

We have done a survey, and I must admit that the data perhaps is subject to extrapolation because of the numbers that we used. We can provide the survey to the committee. But we did a survey and provided the facts to them about the inclusion of retired pay as property and what effect it would have if that retired pay could be divided by a court. We found that we would experience about a 3- to 5-percent decrease in retention of our officers and about a 4- to 6-percent decrease in the retention of our careerist enlisted personnel.

We looked at it in terms of how many it would affect and we found that perhaps we would lose from 500 to 1,000 enlisted men and officers per year with replacement costs, depending upon their specialty, and depending upon whether they were officers or enlisted personnel, would cost us somewhere in the vicinity of $50 to $60 million to replace.

So allowing for the division of retired pay as property certainly would raise a red flag and would certainly have an impact on retention of Air Force members.

Another concern I have is a 5-year marriage period before being eligible for settlement. I think the period is too short. In the military, unlike any other Federal agency, we are not entitled to retirement pay until 20 years have passed. There is no vesting, there is no accrual of retired pay. You must serve your entire 20 years. I think years of marriage should be higher. Whether it should be 10 years or 15 years or 20 years is subject to debate perhaps, but I think the 5-year requirement should be a longer period.

Senator COHEN. General, could I just clarify one issue. I have got two statements from you, both dated April 29. On one it says that the Air Force would lose about 2,100 careerists in the first year. In the steady state we would anticipate 800 to 1,000 losses per year. Then I have another one which is dated the same date which says that we would lose about 2,000 instead of 2,100 and anticipate 500 instead of 800 to 1,000.

General IOSUE. Initially, upon implementation our survey indicates and our analysis indicates that the initial impact would be a loss of about 2,000. In the steady state thereafter we would lose between 500 and 1,000.

Senator COHEN. I know, but one said 2,100 and now it says 2,000. One said 800 to 1,000 and now it says 500 to 1,000.

General IOSUE. I will use that range of 2,000 to 2,100 as initial impact losses and then from 500 to 1,000 steady state.

Senator COHEN. How did you come up with 800 to 1,000 the first time?

General IOSUE. An extrapolation of our survey indicates that roughly that would be the numbers that we would lose.

Senator COHEN. I know. What I am asking is, you go 800 to 1,000 losses a year, and then I have 500 to 1,000. Which one is accurate?

General IOSUE. I would use the 500 to 1,000.

Senator COHEN. Thank you.

General IOSUE. In addition to our concern for the period of qualification of 5 years, and as I mentioned I believe it should be longer, we do support the medical coverage or the requirement for medical coverage for the former spouse. I would recommend that it not be done through DOD because of our limitations, but perhaps we could do it through some national group health plan where the payment of premiums could be determined by settlement direction.

I also believe that there should be a provision in there for utilization of the survivor benefits plan where the member could appoint a former spouse as a beneficiary of that plan.

I do support the max settlement of 50 percent of disposable income and believe that that is a very important feature of S. 1814.

Again, I will just reiterate the fact that I do believe we do need a form of legislation, but I do raise these concerns not to disparage the intent of the bill but again to encourage that we provide a fair and equitable treatment for members as well as the former spouses.

I thank you very much.

[The prepared statement of Lt. Gen. Iosue follows:]

PREPARED STATEMENT OF LT. GEN. ANDREW P. IOSUE, U.S. AIR FORCE, DEPUTY CHIEF OF STAFF FOR MANPOWER AND PERSONNEL, HEADQUARTERS, U.S. AIR FORCE

Mr. Chairman, distinguished members of the subcommittee, it is again a privilege to appear before this subcommittee and to give you the views of the U.S. Air Force on this sensitive and important issue.

Assuring fair and equitable treatment for both parties when a marriage is dissolved is a complex and emotional issue. The Air Force appreciates the significant sacrifices and contributions that many spouses make during the course of a member's career. We also understand the difficulties that a former spouse encounters when a marriage that has lasted many years ends in divorce. With these thoughts in mind, we believe there is need for a solution which is fair to the former spouse, the military member, and the Nation in recognition of the retirement program as one of the Services' most vital personnel management tools and thus a major contributor to readiness.

We believe that S. 1814 is a conscientious attempt to provide a comprehensive solution; however, we are concerned that allowing a State court to consider military retirement pay as property subject to division in a divorce settlement has implications which need to be examined more fully. In addressing our concerns with the legislation, I would like to review the purposes of the military retirement system and what we perceive to be the impact of S. 1814 on that system. Finally, I would also like to present a number of unanswered questions concerning the legislation.

The fundamental purpose of the military retirement system is to facilitate force management; it is our most important personnel management tool. The retirement system provides a legitimate basis for mobilization plans and insures a large, standing pool of skilled, experienced manpower will be available to meet this Nation's wartime requirements. Although specific provisions vary, all retirees may be recalled in time of Congressionally declared war or National emergency. And we plan to do so . . . in large numbers. It also provides the foundation for a strong system of institutional supports which is necessary to partially offset the extraordinary demands of a military career. Overseas service in foreign, remote, and sometimes hostile environments, inability to control living or working conditions, frequent relocations, and abridgement of certain individual rights are but a few of the conditions of service which set military members apart from society. Members are subject to a demanding code of conduct, rigorous performance, moral, and physical standards. The retirement program also facilitates

personnel management by insuring an orderly flow of officers and enlisted members through the ranks to retirement thus maintaining a young and vigorous force. Finally, it is the most powerful factor in the retention equation. A recent survey we conducted revealed that the retirement program is the No. 1 factor in the career decision of enlisted members and officers. Unlike most retirement programs, a military member must remain in service for at least 20 years to receive any benefit—there is no vesting, no lump sum payoff or reduced annuity for service short of eligibility that would "incentivize" early separation. As a result, retirement is the major factor insuring a viable career force.

Having outlined the purposes of the military retirement program, I would like to discuss what we believe the impact of S. 1814 will be on those purposes. Our primary concern is that by overturning the Supreme Court Decision on *McCarty*, the bill would change the fundamental character of the retirement system and diminish its effectiveness as a force management tool.

There are substantial reasons for preserving military retirement as the member's personal entitlement. Retired personnel represent our most significant individual surge capability. It would be more difficult to legitimately and equitably recall thousands of retirees, as now contemplated in a total mobilization, if their retired pay were to become subject to property division and shared by former spouses. In a similar vein, redefining retired pay as property would in essence cede to State divorce courts control of our most powerful career retention incentive. If up to 50% of retired pay could be awarded to a former spouse, the incentive for members who are divorced to remain on active duty and complete a 20-year or longer career could be substantially diminished. Considering that there are about 89,000 Air Force active duty members who are either divorced, separated, or divorced and remarried, making retired pay subject to property division presents important implications for retention and force management.

Because of our concerns about division of retired pay, we conducted an analysis of the potential impact. Although the effect of S. 1814 on retention cannot be precisely determined due to lack of data on behavioral response to changes in divorce law, the raw data available portend a risk of losing many extremely valuable career force members. Divorced members, and many military people are bound to consider S. 1814 as potential loss in their retirement pay. To the extent that this loss reduces the value of continued military service, retention will be reduced. Based on our analysis, we estimate that the Air Force could lose about 2,000 people in the first year after enactment. In the steady state, we would anticipate 500–1,000 losses per year. To maintain the existing readiness posture, additional funds would have to be committed, probably at the expense of other priority programs.

We also have reservations about the provision of S. 1814 that would enable a former spouse to receive a portion of a member's retired pay after only 5 years of marriage. As you know, a military member does not become eligible for retired pay until completion of at least 20 years of service. While 10 years of marriage is the legal minimum required before vesting occurs in other retirement programs (i.e., Social Security entitlement, Foreign Service retirement vesting), in those systems, the member also has a vested interest based on 10 years or less of covered employment or service. Another disparity with this provision is that a member could be divorced very early in his or her career; the divorce could occur long before the member attained his highest rank or grade.

For example a member could be divorced as an E–4 and subsequently retire as an E–9. We agree with the OSD asssessment that the former spouse would receive a windfall based on pay raises, promotions and longevity increases which occurrred long after the divorce. Also, creating a basis for a retirement annuity that does not result from the performance of military service sets a precedent for an award for purposes not related to the defense function and diminishes the psychic rewards associated with earning retired pay based on long and faithful service to this country.

It is important to note that S. 1814 would have widespread application. To better understand the implications, we conducted a State-by-State review of court decisions and applicable statutes. The review identified 24 States which would probably consider military retired pay as divisible marital property if S. 1814 or a similar bill were enacted. However, there is a broader precedential risk that some of the remaining States and the District of Columbia would view reversal of the *McCarty* decision as strong congressional intent to similarly treat retired pay as property. Enactment could be a signal to all States that they would be remiss if they did not divide retired pay.

State jurisdiction and residency requirements could impede personnel assignment actions. Military forces are international in operation, and their members, unlike civilian employees, are not free to choose their place of residence; therefore the value of retired pay as an inducement for reenlistment wou'd be reduced to the extent that the service member would recognize that he or she could be involuntarily transferred to a State that divides retired pay and be subject to its jurisdiction even though the member was a legal resident of another state. A member contemplating or being threatened with divorce would think twice before willingly accepting orders to any community property or equitable distribution state or to others which could subsequently opt to divide retired pay. An equally important consideration is that military service sometimes requires unaccompanied or remote tours and under the worst of circumstances results in a member becoming a prisoner of war. These factors p'ace severe strains on a marriage and could result in divorce proceedings with the member not present to protect his/her interests.

State court records are filled with numerous examples that highlight the impracticality of allowing State courts total discretion in retired pay property divisions:

A California court held that regardless of whether or not the member is retired, the former spouse can determine when his or her share of the retired pay should begin. (*In re Marriage of Luciana*, 164 Cal. Reporter 93)

Another California court held that a member who refuses to retire and begin receiving retired pay must provide the ex-spouse an amount equal to what she would have received as her property had he retired. (*Gilmore v. Gilmore*, 169 Cal. Reporter 811)

An Idaho court consulted actuarial tables to determine what the gross amount of the former spouse's annuity would be if the retiree lived a normal life expectancy and included this figure in a lump sum property distribution. Because Idaho has no provision for periodic payments to satisfy property division, the court had no choice but to order a lump sum settlement. (*Ramsey* v. *Ramsey*, 96 Idaho 672, 535 p. 2d 53 (1975).)

In Montana, a court stated that in the event the wife predeceased her husband, the military retired pay should pass to her estate. (*Miller* v. *Miller*, 609 P. 2d 1185).

Forcing a member to retire or make equivalent payments, directing a member to make a lump sum payment equivalent to 50 percent of his anticipated retirement earnings, and allowing military retirement pay to become a portion of a former spouse's estate are only a few examples of the consequences if a court's authority is unconstrained. This committee has recognized these implications and included provisions in S. 1814 to deny the courts the prerogative to make the determinations discussed above. The committee has also included another provision in its bill which deviates from the normal concept of property by terminating the payments upon the death of the member. Further, in its testimony, OSD recommended that payments be terminated upon remarriage of the former spouse and has proposed certain limitations to minimize forum shopping. However, there are several other important considerations that have not been addressed by S. 1814 which could have adverse impacts on military people and force management:

DOD plans contemplate on recalling hundreds of thousands of retirees in event of full scale mobilization. If S. 1814 were enacted, it is not clear that the former spouse would not continue to receive his/her share of retired pay if the member were recalled to active duty. At issue under these circumstances is whether the member would receive full pay and allowances or if this amount would be offset by the ex-spouse payment.

Federal tax laws could also produce an anomaly. As we understand it, the Internal Revenue Service views retired pay as the member's income. In at least one case retired pay was considered to be property of the former spouse and thus not taxable, but the payments were not deductible by the retiree who was responsible for income tax on both portions. Unless a safeguard were included in S. 1814, retired members could be held liable for taxes on that part of retired pay awarded as property to former spouses—further reducing its value as a retention incentive.

The bill does not require in personam jurisdiction. Therefore, unless S. 1814 were modified, a member who is a POW or on a remote tour of duty could be divorced by his former spouse and subjected to division of retired pay without being given the opportunity to appear in court.

The different residency and jurisdiction requirements for divorce affect S. 1814 differently in various States. For example, it is our understanding Texas courts require only 6 months residency in the State and 90 days within the county before a court has jurisdiction in a divorce suit. Other States have even shorter requirements. If S. 1814 were enacted, to prevent imposing a penalty on military members as a result of military PCS orders, it would be imperative to limit enforcement to those decrees issued by a State in which the member is domiciled or consents to the jurisdiction of the court.

S. 1814 would permit the award of retired pay as community property even if the military member was not responsible for the divorce and thus the bill ignores justifiable grounds for divorce (e.g., adultery, desertion, physical or emotional abuse). For example, in a California divorce case the member was not allowed to introduce evidence of his ex-spouse's infidelity in the court because California has a no-fault divorce statute. In this particular case the member had been a POW for five years. He returned from captivity to find all of his pay and allowances depleted. His former spouse, now remarried, was awarded 43 percent of his retired pay, the house, the car as well as child support.

We raise these issues, not to disparage the intent of the bill which is to provide an equitable solution to a very sensitive issue, but to demonstrate some of the problems associated with attempting to preserve the purposes of the retirement system while concurrently permitting it to be subject to division as property in a divorce settlement.

We are prepared to answer any questions you have.

Senator COHEN. General, before we move on, could I ask you a question. On page 2 of your testimony you indicate that one of the reasons for pension or retirement benefits is because of the extraordinary demands of a military career, and I agree with that.

You say, "Overseas service in foreign, remote and sometimes hostile environments," but "inability to control living or working conditions," doesn't that apply to the wife as well?

General IOSUE. That does, yes, sir.

Senator COHEN. Frequent relocations, does that apply to the wife as well?

General IOSUE. It applies to the spouse also.

Senator COHEN. The spouse and family, and she has got to be the one who many times has to pick up the children and say, sorry, children, you have made new friends, you established yourself in a new environment, we are only here for a year, and now we have got to move again and we have got to pick up and pack the moving van and go all the way across the country and settle down and make new friends.

General IOSUE. She shares in all of that.

Senator COHEN. So if we were to say that overseas service in foreign, remote environments, inability to control living or working conditions and frequent relocations are but a few of the conditions that set military members apart from society, those all apply to her.

General IOSUE. They do.

Senator COHEN. So she has just as much of an incentive or an investment in this particular right as he does, don't you think?

General IOSUE. Yes, she does.

Senator JEPSEN. General Bronars, you may proceed.

STATEMENT OF LT. GEN. EDWARD J. BRONARS, U.S. MARINE CORPS, DEPUTY CHIEF OF STAFF FOR MANPOWER

General BRONARS. Mr. Chairman, I am pleased to appear before the subcommittee to discuss several important and sensitive issues that are included in the legislation we are reviewing.

The Marine Corps does recognize and appreciate the many sacrifices and the numerous contributions that many spouses have made during the course of a military career. We also recognize that on occasions some spouses run into serious difficulty when a long marriage terminates with divorce.

However, our main concern has to remain the maintenance of a strong, combat capable Marine Corps and adequate military compensation, of which the retired pay is a very important part, plays a key role in achieving that objective.

The retirement system is an essential element in our ability to meet mobilization requirements and insures, as General Iosue pointed out, that we have a large, standing available source of skilled, experienced manpower to respond to a mobilization situation.

And, as he also points out, and what I consider to be most important, the retirement system is a powerful retention incentive, one that we think is very necessary to partially compensate at least for the unique and extraordinary conditions of military service.

So from that perspective, the Marine Corps would oppose any legislation that adversely affected the retirement system or had an adverse impact on career decisions and on the resulting manpower mix in the Armed Services, and ultimately producing increased recruiting and training costs over the long term. We do think this legislation, as written, would affect the retention of career personnel. In order to replace those that would leave, we would have to recruit and train additional personnel to replace the experienced and the skilled personnel that would be affected.

Senator COHEN. General, do you mean to say that a man who is in the service decides that I am coming up to 12 years or whatever we decide upon, and I agree with General Iosue that the 5 years may not be appropriate, but you mean to say that a marine is going to look and say if I reenlist and stay on that now my wife, who I am having some difficulties with, might get a portion of my retirement benefits and therefore I am getting out?

What do you base that on, other than what you think?

General BRONARS. I base it on logic. I don't have any data to support that contention.

Senator COHEN. You mean the emotionalism that you feel that the marine might experience at that time saying, gee, I don't want to even risk allowing a court to make an independent determination of whether she is going to get a portion—5, 10, or up to 50 percent of my retirement benefits? Is that the kind of analysis you think that every marine is going to go through if he decides whether he is going to stay in and reup for another 4 or 5 years or whatever?

General BRONARS. I do think that somebody that goes through a divorce proceeding and the court finds that his retired pay would be distributed in a certain manner, say, 50 percent——

Senator COHEN. It could be 5.

General BRONARS. It could be 5 percent, whatever, but let's assume it is 50 percent, and he is at the 10-years-in-service mark and he has 10 more years to qualify for retired pay. He would think seriously about continuing in a career in the military knowing that whatever retired benefits he earns would automatically accrue at a 50-percentile rate to his former spouse. Many would consider starting a new career

as a civilian. I think that thought process could certainly be considered by those individuals that were affected.

Senator COHEN. Do you have any empirical evidence that this kind of thought process occurred prior to the *McCarty* decision?

General BRONARS. No, sir, because I don't think that there were that many States that were applying community property division as is being proposed in this piece of legislation.

Senator JEPSEN. General, I would like to follow and project your thinking here. Assume that S. 1814 is enacted into law and that a service member leaves the military, as you have indicated, rather than take the chance that his retired pay might be divided if he was divorced. Let's follow that along. He then proceeds to take a position in government, civil service, foreign service, elected office, or pursues a job in the private sector with a pension plan.

My first question to you is whether his retirement benefits in any of these positions, in any of these areas that I just mentioned, might be divisible upon divorce—and the answer is yes.

General BRONARS. I assume they are divisible by divorce.

Senator JEPSEN. Then the $64,000 question is, why would he leave the service if he faces the same problem apart from the service?

General BRONARS. The situation I was talking to was one wherein the divorce had already taken place; the individual affected was on active duty, and at the time the divorce proceedings took place he already had 10 years of active service, and the finding of the court was that his ultimate retirement pay would be divided on a 50/50-percent basis, and when he had a vested interest at 20 years and decided to retire. I am saying that under those circumstances, he certainly would think very seriously about continuing on active duty.

Senator JEPSEN. I am advised by counsel and the staff here that no State does this.

General BRONARS. Sir?

Senator JEPSEN. That no State does this. Go ahead.

Mr. PRINCIPI. We know of no State that awards on a regular basis 50-percent of military retired pay to ex-spouse based upon 10 years of marriage. Theoretically, yes, sir, it is possible, but in 10 years of marriage, an ex-spouse might get 15 percent or 20 percent. But the norm is certainly far less than 50 percent. So I think the assumption is invalid and therefore the conclusion might be invalid.

But, yes, you are right, sir, it could theoretically be 50 percent, but I don't think that is in fact the case. I think statistics do show that in marriages of short duration that military retired pay is rarely a factor in marriage of short duration of 5, 6, or 7 years. As you move along, it then does become more of a significant factor.

General BRONARS. I accept that comment. However, I do think it is a factor that we ought to be concerned about because if the court orders 25 percent, it is something that the individual serviceman is going to consider seriously if he is at the 10-year mark in his career.

Mr. PRINCIPI. If I could just add one further point. If the State courts, as the State Court of Florida is now awarding 50 percent as permanent alimony, what effect would that have on retention? If it is having an effect as community property but the payments are the same, what in effect is the difference?

General IOSUE. I can just give you an example of how the Air Force conducted its survey to determine the impact of having the retired pay be considered as property and we did not use a 50-percent figure. We used 15 to 20 percent reduction in the annuity of the member.

I would like also to give you some demographics of the numbers that we have. We have some 89,000 individuals, both enlisted and officers, in the Air Force who have been separated or divorced and that represents about 15 percent of our force. Yet you look at them in terms of years of service and you find that 37 percent of them have 8 years or less of service.

So what that means is now if we have a change or we have a piece of legislation that says your retired pay is going to be considered as property and subject to division, they are not committed to a career because generally we lose people at below the 10-year point. If that is a factor, what I am saying is, it could have an adverse effect on our ability to retain those people in the Air Force.

Senator COHEN. It may be an incentive for them to stay married. [Laughter.]

General IOSUE. I would applaud that, any incentive.

Senator COHEN. If it is that much of a concern, they may say, hey, wait a minute, I kind of like the military. I am the Great Santini—a movie that I admired very much—and I have a tough family situation, but maybe I want to stay a marine or a navy man or an air force man or an army man and I like that career. Things are a little bit bad with my wife, but I think I can patch it up, and by the way, I like that pension right just the way it is and I will stay married. It could be that it would have an opposite effect.

Senator JEPSEN. I might also ask the question—and of course we are batting figures around—but I would guess that the majority of those divorces that you are talking about were probably before 5 years, of fairly short duration.

General IOSUE. Fifty percent of the 89,000 are under 4 years.

Senator JEPSEN. In which case even at this low area which one panel member has conceded may be a little bit too early, the great majority of the 89,000 you mentioned, I guess the majority of those were before the *McCarty* decision. And had not the *McCarty* decision come into being, we wouldn't be here today, I guess.

It is difficult, and I say this constructively, it is difficult on an analytical basis to suddenly say the *McCarty* decision changed what, for years, had been in existence and there had not been any at least reportedly obvious problem and then suddenly, because of the *McCarty* decision, if it has changed the recruitment and the retention and so on, there is going to be a dramatic effect and impact. It is hard to follow.

Were you through, General?

General BRONARS. Yes, sir. I think during the discussion period, I would have a few more points to make. Thank you.

Senator JEPSEN. You are welcome. I forgot that we had interrupted you with a question.

General BRONARS. I think it would be important to note that retired pay is referred to as retainer pay also; this has a connotation that it is reduced pay for continued service, and that in effect is what it is.

In other words, the individual that is drawing retired pay is still obligated to continuing service when called to do so. He is still subject to the Uniform Code of Military Justice. If he does certain acts, his retired pay can cease upon such determination on the part of his service.

He is also subject to recall, at which time his retired pay stops and he starts receiving active duty pay. He is also limited in the types of employment he can take to avoid conflict of interest. So there are certain obligations that the individual that qualifies for retired or retainer pay has to live up to.

As a consequence, it simply isn't a retired compensation that he receives. He continues to have obligations to serve during a mobilization situation when recalled. As a consequence, I think that there will be significant difficulties in adjudicating the administration of the type of legislation that would establish retired retainer pay as community property and would then lead toward a common practice of dividing it between the husband and wife who separate through divorce proceedings.

That was just a point that I thought should be brought to your attention.

Senator JEPSEN. Thank you.

[The prepared statement of Lt. Gen. Bronars follows:]

PREPARED STATEMENT OF LT. GEN. EDWARD J. BRONARS, U.S. MARINE CORPS, DEPUTY CHIEF OF STAFF FOR MANPOWER, HEADQUARTERS, U.S. MARINE CORPS

Mr. Chairman, distinguished members of the subcommittee, it is again a privilege and a pleasure to appear before this Subcommittee and to give you the views of the Marine Corps regarding this important and sensitive issue.

The Marine Corps recognizes and appreciates the frequent sacrifices and numerous contributions that many spouses make during a member's career. We also recognize that some former spouses encounter considerable difficulty after a long marriage ends in divorce. Remedial action is required that is both fair to the former spouse and to the military member.

Our primary concern must be the maintenance of a strong, combat-ready Marine Corps. Adequate military compensation, of which retirement pay is one of the most important elements, plays a key role in accomplishing this goal. The retirement system is a vital element in compensation and in force management, serving specific military purposes. It provides a legitimate basis for mobilization plans and ensures a large, standing resource of skilled, experienced manpower to meet wartime requirements. The retirement system is a powerful retention incentive and provides the foundation for a strong system of institutional supports that is necessary to partially offset the unique and extraordinary conditions of military service. Changes that would adversely affect the retirement program must be expected to impact negatively on career decisions and on the resulting manpower mix in the Armed Forces, producing increased recruiting and training costs over the long term.

The Marine Corps therefore would oppose legislation that redefined retired pay in such a manner that would adversely affect force management to an appreciable extent.

In view of the importance of military retired pay in managing the Armed Forces, the significant issue in this legislation is whether the Federal Government, having particular responsibility for the effectiveness of those forces, should modify its position concerning the way that State courts may view military retired pay in divorce settlements. I agree wholeheartedly with Doctor Korb's statement before this subcommittee in March, when he offered the opinion that, "State courts bound by inflexible distribution or allocation requirements mandated in State law should not be authorized to make a distribution of the military member's retired benefits without regard to fault, need, or other equitable considerations." I would carry the thought further and say that States with laws that limit their ability to act completely fair have created a situation

that can best be resolved by those States rather than by the Federal Government.

If the *McCarty* decision is overturned the following provisions should be added to the legislation: Raise eligibility to 15 years of marriage during 15 years of service; minimize "forum shopping" by limiting enforcement to those orders issued by a course in a State in which the member is domiciled, resides, was married, or in which he consents to the jurisdiction of the court; provide only for prospective enforcement of court orders; preclude enforcement of court orders issued in those States which do not allow judicial discretion in determining amounts that would be payable; reflect clearly that, with the exception of the diversion authorized by the bill, retired pay remains the personal entitlement of the member; and provide payments under this and existing garnishment statutes, when combined, will not exceed the separate limitations for each.

Before closing, Mr. Chairman, I would like to reiterate the Marine Corps' basic position: Military retired pay is an essential element of compensation and one of a number of interrelated means of managing the force. The Marine Corps, the other Services and the Federal Government all have a huge stake in preserving the effectiveness of that system. We believe that the Federal Government should not step in when existing State laws cause an inequity; rather that the States must assess the situation and act appropriately.

Mr. Chairman, this concludes my prepared statement. I will be pleased to answer any questions that you might have.

Senator JEPSEN. Admiral Zech?

STATEMENT OF VICE ADM. LANDO W. ZECH, JR., U.S. NAVY, DEPUTY CHIEF OF NAVAL OPERATIONS (MANPOWER, PERSONNEL AND TRAINING)

Admiral ZECH. Thank you, Mr. Chairman.

The Navy position is in support of the Department of Defense position. I am here today, I presume, Mr. Chairman, to give you my personal views and I would be pleased to do that if that is what you want me to do.

Senator JEPSEN. Yes, sir.

Admiral ZECH. I have a written statement for the record which I will submit.

Senator JEPSEN. It will be entered in the record as though read and you may proceed in any way you so desire.

Admiral ZECH. Thank you, sir.

I, too, appreciate the opportunity to appear before your committee again, Mr. Chairman, to testify on this very important issue.

It is a difficult issue. Certainly I recognize and the Navy recognizes the sacrifices and the contributions of our Navy spouses to the overall Navy contribution to our country. We certainly recognize, too, that Navy life can be very difficult and very trying. With the long separations and long deployments Navy life can be very demanding and in many cases, too many cases, it can end in divorce.

Navy life can also be very rewarding, as difficult as it is, and we certainly would do everything we could to maintain our Navy marriages, recognizing the difficulties and the challenges. But, realistically speaking, we know that some do end in divorce.

I believe this committee is trying, and certainly I would support an effort to find a fair solution for both the former spouses and for the Navy members when the tragedy of a divorce takes place.

Essentially and very briefly, I believe that retired pay should indeed be considered as income in a divorce proceeding, but it should not be considered as community property. The decision should be made on

a case-by-case basis in decrees of divorce. The decision should not be automatic, nor should it be perceived to be automatic.

I, too, am concerned about the retention of our Navy personnel if retired retainer pay would become considered as community property and division becomes automatic in some courts in divorce.

I would like to reiterate the uniqueness of retired or retainer pay, and it is both retired and retainer pay. It is unique. It is not like many pensions and old age benefits given for long and faithful service. In other words, 20 years of service are required before you have retired pay, unlike many vesting plans for lesser years in industry.

But I think the major provision that makes retired retainer pay different from general pensions and other types of retired pay is that the member is subject to recall to active duty. As a matter of fact, in the Navy right now our plans provide for recalling over 50 percent of those retired individuals who are under 60 years of age. All retired members of all the services are subject to the Uniform Code of Military Justice. There are restrictions on their employment when they are retired.

So, retired or retainer pay is indeed unique and in my judgment it is proper to call it reduced pay for reduced services. I also believe that if we consider retired pay in the category of property it would indeed have a bearing on retention of our career force.

Retired pay is one of the strongest career incentives that we have for our career force, for our senior people. And although we do not have specific data because of the newness of this issue, we have a concern that some of our career people would choose to not stay with us in the Navy rather than forfeit a considerable percentage of their retired pay to an ex-spouse.

We prefer to think that the divorce alimony or spousal support proceedings in court could make a fair and proper decision in that regard and it would not be an automatic decision in a divorce court.

Those are my essential concerns, Mr. Chairman, and I would be pleased to respond to any further questions you may have.

[The prepared statement of Vice Admiral Zech, Jr. follows:]

PREPARED STATEMENT OF VICE ADM. LANDO W. ZECH, JR., USN, DEPUTY CHIEF OF NAVAL OPERATIONS (MANPOWER, PERSONNEL, AND TRAINING)

Mr. Chairman and members of the committee, I am Vice Admiral Lando W. Zech, Jr., Deputy Chief of Naval Operations (Manpower, Personnel and Training).

It is a pleasure to appear here today and participate in this important hearing on S. 1814, Senator Jepsen's bill concerning former spouses of members of the uniformed services.

The problems associated with the ever increasing trend toward divorce in the United States is a most serious situation. The just and equitable treatment of all family members when divorce occurs is of concern to the Navy. In regard to the support of dependents of Navy members, it has been the long standing policy of the Navy that all members shall provide adequate and continuous support for their lawful dependents and comply fully with the provisions of separation agreements and valid court orders. I am aware that some former spouses of service members have complained that they and their children are experiencing severe hardships due to a lack of adequate and continuous support. I am also aware of extreme cases in some States where, because of inequitable divisions of property, the service member is sometimes unfairly disadvantaged. I believe that the extreme cases at either end of the spectrum do not represent the majority of our members or former spouses. I must also observe, however, that some prob-

lems associated with a lack of adequate support for former spouses are caused by inadequate or non-existent State alimony laws.

Most of our service members regard the Armed Forces and their Government with special loyalty. Our personnel expect that we will safeguard their interests. Many of them have had to choose between duty to their country and the convenience, comfort, and, sometimes, the happiness of their families. In our attempt to aid former military spouses, we must insure that we do not generate the perception that we are abandoning our service members to the sometimes arbitrary decisions of others.

Military retired or retainer pay is unique in modern personnel management. It is not truly "vested" nor an "annuity". It is more properly termed a conditional entitlement because of the conditions associated with the receipt of the pay. Military retirees are subject to recall to active duty with a consequent loss of retired pay. There are other "strings" which we attach to it. We significantly reduce monthly retirement pay if a retired regular officer is employed by the Civil Service. We prohibit retired regular officers from selling to the Department of Defense or other Government agencies and all retirees from being employed by a foreign government without congressional or secretarial approval. This, of course, stems from the fact that a military retiree remains a member of the military service, unlike the pensioner from any other employment whose pension is unconditional and a "vested" right. In addition, the member receives no "vesting" until serving 20 years of service. If a service member fails to complete 20 years of service, there is no entitlement to any retired pay.

Military retired or retainer pay is an integral part of the military compensation system. Any changes that are made to it will impact on the active duty force structure. Many, if not most, career decisions of our personnel are made based on individuals' perceptions of the stability, reliability, and integrity of the retirement system. Reductions to military retired or retainer pay will require compensatory cost increases to other elements of the compensation package if we are to avoid retention losses. More than any other single incentive, the retirement pay program attracts those with eight to twelve years of service to opt for a naval career.

Military retired pay is current pay for current services. If this compensation is now to be treated as the property of retirees and their spouses or former spouses and if we begin to regard military retirement pay the same as civilian sector pensions, we ought to be prepared for military retirees to demand the same treatment as private sector pensioners.

The consequences of permitting State divorce courts to treat military retired pay as community property will result in inconsistent decisions that may be counter productive to our efforts to manage the military force.

Finally, we should consider the effect of any change to the law on the typical military retiree. The typical retiree is an E–6 or an E–7 with 20 years of service. The typical Navy retiree probably served 10 to 12 years at sea including combat tours in Vietnam. He receives about $650 a month in retainer pay and is more likely married than not. He probably has been married to the same wife for over 10 years. Will he understand that the Government wants him to forego a portion of his retirement pay if he happens to get a divorce? Will he understand it if he finds that his share will go to his ex-spouse for the rest of his life, even if she remarries? I don't think so. He will more likely feel that his Government was not looking out for him in return for the sacrifices he made to the country during his career.

I would be pleased to answer your questions.

Senator JEPSEN. I have an ad I think you are familiar with. It says the Navy's wife is the toughest job in the Navy.

Admiral ZECH. Yes, sir

Senator JEPSEN. It says it has been a long time coming since the Navy wife got the recognition and credit she deserves. You are one of a kind and just as important to us as your husband. So if your husband is approaching reenlistment, we hope you will both think about the many benefits you have got going for you. [Laughter.]

It would be a good idea to talk to the Command career counselor, too. Why not find out what is ahead for both of you. [Laughter.]

We want to keep good families in.

You know, the just and equitable treatment of all family members when divorce occurs is of concern to the Navy. Now that is your statement.

Admiral ZECH. Yes, sir.

Senator JEPSEN. How do you provide for equitable treatment when the only asset of marriage is retired pay?

Admiral ZECH. I believe in every statement that you read, Mr. Chairman. It is very true. We do indeed believe that Navy spouses are important and they make a very significant contribution to the readiness of our Navy, and I personally believe that this contribution is not in an indirect way as some say, but in a very direct sort of way.

I would hope that our Navy families would stay together and I believe that our Navy is strengthened by strong marriages and strong family ties. But when we do have divorces, there are always two sides to the story and in some cases the fault certainly would lie with our Navy member. In that case I would presume that the divorce court would consider his entire income, including all of his assets, in any kind of a settlement for alimony that would be fair to that Navy wife, who has done such a fine job.

On the other hand, there are cases of women who do not stand by their husbands in time of stress and some of them simply aren't capable of doing so and some of them choose not to.

So I think it is very difficult to say that there is a generalization here. I would submit that our Navy spouses are doing a marvelous job in support of our Navy and should be well considered in any divorce court.

Senator JEPSEN. Senator Cohen, you go ahead. You were going to ask the same thing I was. You know, if it is one way and the courts show due justice and so on, and then if you are looking at it from the other side, the innuendo is that the courts would not look at it equitably or fairly.

Admiral ZECH. I am saying, Mr. Chairman, that I believe the courts would look at it fairly and they should look at it on a case basis. The community property aspect, in my view, would tend to encourage the court to make an automatic decision without having to look at the individual case: How many children are involved, what the wife's position is and what the husband's position is.

To me a divorce is a very personal thing. I am concerned when you consider retired or retainer pay as property, rather than as income. It certainly should be considered as income, but it should not be considered as property, to be divided like other property as we know it. That is my only concern. Not to be unfair to anybody, but just to consider each case on a case basis.

Mr. PRINCIPI. I would like to make a clarification. There are three States, three of the eight community property States that prior to the *McCarty* decision considered military retired pay as a community property asset. But it does not automatically mean that in every case the ex-spouse would receive a percentage of it.

Now, do the services have any data to indicate that in a divorce in California, a marriage of 8 or 10 years, that the ex-spouse would automatically receive 10, 15 or 20 percent of that?

Admiral ZECH. I have no data at all. My concern, and I have no data to back it up, is that this is a very important and significant issue we

are addressing. It seems to me it is a new issue. My personal concern is that if you considered retired pay as property, in some States, community property States as we know them, the tendency would be to consider that income as property. Therefore, I think that a law as passed by this body could tend to make these States consider that income in an arbitrary and automatic fashion, and I think that would be wrong.

Senator JEPSEN. Can you explain what you mean by arbitrary decision of others? Who are you referring to?

Admiral ZECH. To the tendency of certain community property States, States which have community property laws, to divide up the property in an arbitrary fashion, and if retired pay is considered as property there, I think that would be wrong. I think retired pay should be considered as income and treated as such in any kind of a decision rather than automatically divided as property might be divided. whether it is 10 percent, 15, 30 or 50 percent. Property, as I understand it, is divided that way. I believe retired pay should be considered as income and considered separately from property.

Senator COHEN. Admiral, let me ask you. What decision is not arbitrary in a divorce settlement?

Admiral ZECH. I am not an expert, Mr. Senator, at all. All I am saying is that in my view a divorce proceeding is very sensitive, and very tragic. It is a very personal thing and it is a judgment call. It is a judgment call on the part of the judge, and he should be allowed the opportunity to use his conscience, say a few prayers perhaps, and make the best judgment that he can. If he leans toward making an automatic decision, I think that is wrong. I think it is a judgment call and I don't think it should be arbitrary.

Senator COHEN. Let me tell you what the experience is in our domestic courts. You walk into a domestic court and have a divorce. What do you think the chances are that the court is going to award the house to the wife to take care of the children? Is that arbitrary or is that fair?

Admiral ZECH. If I understand you——

Senator COHEN. What is the established practice? What is the practical result if you have a divorce and you have young children, let's say, and the question is who gets the house?

Admiral ZECH. I would presume that the wife gets the house in most cases.

Senator COHEN. Is that arbitrary or is that fair?

Admiral ZECH. I would presume that in most cases that is a judgment call and you can call it arbitrary, if you will. I think our country has come to expect that and I suppose it could be considered arbitrary. I would consider it a judgment call. In some cases I think it could go the other way.

Senator COHEN. Well, in the great majority of cases I can assure you that it goes the way in which I have suggested. Let's suppose you have two minor children at home and you have an income of $200 a week. Would you guess that the court might very well award the wife $50 a week minimum for child support?

Admiral ZECH. I would certainly think so.

Senator COHEN. Is that arbitrary or is that fair?

Admiral ZECH. I think it is a judgment call, Senator, and you can call it arbitrary.

Senator COHEN. What I am trying to suggest to you is that no matter what decision you reach it becomes rather institutionalized, but courts do take into account relative earning power. They take into account the contribution of the wife to the marriage, if she was not supportive, if she has not been dutiful and if she has not done a host of things. The chances are that the alimony award reflects that. The chances are that they take into account what the husband is able to pay from his weekly base to what he should in fact, what percentage he should give to the children, should it be 25 or 50 percent, and what was he giving before? Those are all handled on an individual case-by-case basis, and I would assure you that the same thing would take place with respect to retirement pay. The same factors he would take into account as alimony he would take into account for retirement.

So I don't understand what the apprehension is that courts automatically would say you get 50 percent. You weren't very good in terms of your contribution to the marriage, it didn't last very long, but you are still entitled to 50 percent.

Admiral ZECH. Senator Cohen, I could be dead wrong. I just feel that there is a concern here that the decision would not be made on a case basis, that if we considered property it would be made on an automatic basis rather than on a case basis. That is my concern.

Senator JEPSEN. General Webb, you may proceed in any manner you so desire before we get into general questions.

STATEMENT OF MAJ. GEN. WILLIAM L. WEBB, JR., ASSISTANT DEPUTY CHIEF OF STAFF PERSONNEL, DEPARTMENT OF THE ARMY

General WEBB. I will take you up on an earlier invitation to give my personal opinion. However, I would like for the record to say that as part of the Department of Defense, the Army does support the position as articulated by Dr. Korb on March 10. We feel that his amendments improve S. 1814. I will not go through those, although I have them listed, for the sake of time, but I would like to emphasize two points which were brought out in earlier questions by you.

The first is the vulnerability of service members to recall. The Army has now issued over 90,000 orders to retirees to be recalled at time of mobilization. They have them in hand. There will be more, perhaps up to twice that number issued in the upcoming months and near years.

The second one in response to your question about retention. What impact would we have and do we have empirical data, Senator Cohen asked that. We have no empirical data in the Army, and I would like to go into the rationale but also give some judgments.

You mentioned earlier, sir, the emotionalism that surrounds that. I think with what has happened in the *McCarty* v. *McCarty* decision and what has transpired in the several committees in the Senate and the Congress, the many discussions with all of the output into service journals and the public media that attention has focused on this issue.

We overtly chose not to go out and poll troops for a number of reasons. One, it is very hard to transmit to the soldier in the front line, be he a lieutenant or a private, an understanding of the issues and an

understanding of the debates that are going on. So we chose not to poll our soldiers.

I do, however, know that we in the Army have received a number of calls and letters and have had discussions with retirees. I personally have talked to two large groups of military retirees in the last month or month and a half. I am attuned to the acute interest in your bill particularly.

I also should point out that the Chief of Staff of the Army has formed a retiree council composed of both officers and enlisted who advise him on retiree matters. That council has recommended to our Chief of Staff that the Department of the Army oppose bills which would give innate rights to divorced spouses.

Thus, when you look at retention and accession, the impact is such that we did not want to exacerbate further what is already a rather volatile situation.

I will discuss retention first. If real acrimony exists, some soldiers have said they will leave the service before retirement rather than yield their retired pay. Can we quantify that with numbers? We haven't asked, so we can't.

Perhaps atypical I would hope is the 19 years of service married officer who, when she read your bill, said that if it is passed "I will leave the service rather than give him a nickel." We hope that is atypical.

We are more concerned about mid-career personnel, and particularly in those with 6 to 10 years of service. As my compatriots mentioned, many of those are still deciding whether they want to stay. We are particularly concerned about the ones with critical military skills, the ones that have readily marketable skills in the civilian market. We also are concerned that they would look forward to the time when their previously planned for retirement pay could be undercut. We are very concerned about losing the critical skills and this could perhaps lead to, as Dr. Korb said, a necessity for more incentives.

I will conclude the total thing on accession and retention by saying this. An officer who recently spent 18 months in the area of enlisted separations and 18 months in officer retirements wrote the Department of the Army a little resume.

Her views:

> The number of military careers ended or derailed because spouses literally ceased to support the military member were too numerous to count. I honestly believe that if Congress concludes that all spouses are entitled to a percentage of military retired pay by virtue of holding a marriage license for 10 years, the exodus from the Army prior to 10 years of service and/or 10 years of marriage could be devastating.

She also points out an important perspective and it is a different one. She feels it might well be unfair to female career soldiers. This is a new aspect for all of us in the service and a growingly important one. She says if she has tried to balance a married life with a military career and it does not work out after 10 years, she would owe her ex-spouse forever for not supporting her career in lieu of his.

As to retention, we recognize that were we to lose a sizable number of mid-careerists, it would adversely impact on combat readiness and also on that middle structure leadership which would hopefully encourage the junior soldier to stay because of job satisfaction and good leadership.

I would point out that soldiers entering the service are acutely aware of their benefits or their lack of benefits at time of entry. I have a view, and again we have not polled our soldiers, but I think this version will cause what is a very positive incentive, and that is ultimate retirement, if it were to be decremented, will cause some to take a second look.

So I think in summary on that particular point, and then I will move to my personal opinion, with the declining manpower pool in this country in the years of the 1980's we need positive incentives to join and remain in the service and not negative ones.

Now as far as S. 1814 is concerned, it does, as you know apply to the four services represented here today, plus Public Health, Coast Guard, and National Oceanographic and Atmospheric Agency. It is not so clear as to whether or not it applies to retired Reservists.

In stepping back and giving my personal view, I think it is appropriate to consider both the philosophy and the moral principles involved. I think I share what I have read in the testimony, in great detail, before the committee.

The Army and the Congress both want to protect and secure the interests of the service member and the family. This responsibility exists whether the family is a unit or under the unfortunate circumstances where the family breaks up through divorce, dissolution, annulment, or legal separation as cited in your bill.

As to the moral principle, we think, of course, as others have said, we should treat the service member and the family equitably and fairly. I join what others have said about the emphasis on taking care of spouses to include divorced spouses.

I think there are two underlying premises which the Senate is considering with respect to your bill.

First, what should the Congress do as a result of the *McCarty* decision by the Supreme Court, which passed to Congress the challenge of reconsidering the status of service members' retired pay? Is it to be personal entitlement earned through sustained and often severe sacrifice, or community property? There are some considerations to this.

Pre-*McCarty* the intent of Congress appears to have been that it was personal entitlement, and the Supreme Court has so noted. Today more than ever before in history the fact of recall of retirees is with us. The dynamics and the danger of the world situation make this essential and even more so in the future.

The Chief of Staff of the Army recently got a letter. It says:

Dear General: I have read your encouragement to sign up as a recalled retiree. I report to you, sir, that I am in excellent health, I am 84 years of age and I await your orders.

[Laughter.]

General WEBB. There is no doubt in my mind that the great number of retirees we have in this country will spring back when we need them. Thus, on that point I conclude that the proposed legislation does not protect the interests of the soldier who, when he is eligible for retired pay, unlike many other Federal retirees, must be ready to answer the call to return to duty.

My second underlying concern is the Army's responsibility to the family and in particular, the divorced spouse. The issue here is what is the role of the Federal Government in meeting this responsibility?

It appears to me that the premise is whether all spouses make major contributions to the service member and to the service, thus have earned part of the service member's retired pay, removing such pay from the status of entitlement or retainer and making it community property. That is the premise.

Now I know from long years in the Army that spouses in many, many cases make invaluable contributions and most of those, not all, but most of those are based on strong marriages for the married ones. But if the premise is the basis for the bill, as I have articulated it, it is a question of do we now need, in the light of the bill, to start recording and measuring what the spouse contributed to the marriage. We would not like to do that.

There are some wives who do not contribute. There are some who do not accompany their service members to duty stations and choose to remain in place and pursue their own careers, or in many cases are denied accompaniment of their family member because there are no billets for them to live in, particularly in overseas areas. There are a number of them who are separated by wars, prisoner of war status, and service member nonaccompanied tours, and, when the family is ultimately rejoined, unfortunately some of those decide to separate.

Again, if the premise is that the spouse has earned a portion of the service member's retired pay as community property, then the question might well be asked should the ex-spouse's interest terminate at the service member's death. If that is earned pay by the spouse, one could make the case that it should continue after the service member's death.

One could go beyond if one accepted that, and this perhaps could be addressed in the court, if it continues, would this encourage even more divorces so that one might save insurance and survivor's benefits.

My experience based on nearly 35 years in the service as an officer is that I have not seen negative comments about a spouse in the fitness reports, the efficiency reports of officers or enlisted men, and I have read probably as many and participated in as many as most.

Senator COHEN. You have never seen a single negative report about a spouse?

General WEBB. That is correct. I have seen some positive ones which talked to the team and the positive nature of the team, particularly for sensitive duties.

Senator COHEN. Does that help him rise up the ladder of promotion?

General WEBB. Not in and of itself.

Senator COHEN. Does it help?

General WEBB. It won't hurt.

Senator COHEN. Then why is it in there?

General WEBB. Because that is at the discretion of the individual who makes the comment.

Senator COHEN. What does that have to do with his career mobility? If it is not relevant, why even include it? You said it doesn't help.

General WEBB. I will give you a specific example to demonstrate the point, Mr. Senator.

I have seen a few reports which say this couple is so good as a team, so good with rapport, and so forth, that they possibly should be considered as an attache team in a foreign country, particularly for foreign area officers. That is a very meaningful comment when we look at foreign area officers for assignment. There are not many that com-

ment at all on the wives. Our regulations neither include or prohibit it. It is the exception if one is made.

The reason I bring that point up is I know you have brought that subject up in previous testimony.

Senator COHEN. What you are telling me then in these officer evaluation reports is that the role of the wife has absolutely nothing to do with his promotion or lack of promotion as a matter of either implied or express policy.

General WEBB. There is no way anybody could make that comment.

Senator COHEN. What comment?

General WEBB. As you stated it, that whether there is a comment or not it would have——

Senator COHEN. What I am saying is does the wife's role have nothing to do with his career in terms of his promotion or lack of promotion?

General WEBB. No; as a matter of fact, I would face that one head on and go the other way.

Senator COHEN. No; I want you to answer that question the way I have asked it. Does the wife, her role or lack of role have anything to do with his promotion or lack of promotion? Is she in fact irrelevant?

General WEBB. It can. It need not necessarily——

Senator COHEN. It can. So it is a factor to be considered?

General WEBB. It could be.

Senator COHEN. Is it?

General WEBB. There is no answer that I can give you yes or no on that subject.

Senator COHEN We are going to go over and vote and we are going to come back. In the meantime I hope to go back over some of those reports I have looked in which there is comment about the wife's role as to whether or not she socialized or took the time to go to these evening events or kicked in on the weekends to produce——

General WEBB. I am sure that some can be found. I say I have not seen one in 35 years of service.

Senator COHEN. I have only been here 4 years on this committee and I have seen some already.

General WEBB Oh, I could find some, I am sure.

Senator COHEN. You say you could find some?

General WEBB. I am sure I could find some if I want to.

Senator COHEN. Then why do you say in 35 years you have never seen any.

General WEBB. That is a statement of fact, Mr. Senator, and I have read thousands of them and written hundreds of them, too. What I am trying to portray and apparently not very successfully, is that it is not the policy of the Army to comment on the wife and our Army regulation makes no mention of that. It is not precluded.

Senator COHEN. Is it Army policy to take her service, her contribution into account in evaluating an officer?

General WEBB. I would say no.

Senator COHEN. As a matter of policy it is not included?

General WEBB. That is not included in any Army policy.

Senator COHEN. Express or implied?

General WEBB. Not from the Department of the Army's view. I could not answer what you might think if you were a battalion com-

mander and you had a team of pros and cons. You might. There is no way that can be measured.

Senator COHEN. So what you are saying is that as a matter of practice and as a matter of policy the wife's role is not considered in terms of her husband's career?

General WEBB. No; I don't think you can say that either. As a matter of written policy, no.

Senator COHEN. I am saying policy.

General WEBB. Well, OK. I probably could just have well left this alone. [Laughter.]

I am trying to answer your previous question because I know you have a question, but I will face it head on because I have lived it a long time and I understand it.

Officers are selected for promotion, which is what you centered on, by centralized promotion boards in most cases.

Senator COHEN. What do they take into account?

General WEBB. They take into account what is written on the records.

Senator COHEN. And no other factors?

General WEBB. I can't say that, no. They could take the knowledge of the individual and it depends on who is the board.

Senator COHEN. I accept that. And the wife's role is not written on the record and therefore she is not taken into account.

General WEBB. That essentially is correct. I must come back to your point because there may be some people that do comment, but that is not the policy of the Army. We can't dictate what goes in there.

Senator COHEN. OK, I just want to come to the conclusion and I just want to satisfy myself that it is in fact Army policy, and I assume the same applies to the other services, unless they speak up, and silence will be construed as an admission, that in fact the wife's role is not taken into account in terms of the promotion or lack of promotion for soldiers or officers.

Can I say that and be correct?

General WEBB. You can say that, but let me add one other thing. [Laughter.]

Senator COHEN. It is accurate but it is not true. There is a movie out about that. [Laughter.]

General WEBB. I would counter it by saying this. The performance of an officer or a noncommissioned officer is enhanced materially, his morale, his attitude and his desire, by a family who is supportive of him. So just his performance will be enhanced by the wife and I can testify to that.

Senator COHEN. So if he has a bad marriage, the chances are he is a bad soldier?

General WEBB. No; I wouldn't make that conclusion either. But I can say this, that an individual who is divided by domestic disturbances may have some problems that could show up in duty. That is true.

Senator COHEN. I just want to know what the role of the wife is.

General WEBB. Very important. [Laughter.]

I am sincere when I say that.

Senator COHEN. I know you are. What I am trying to get at is what is the role of the wife, what does she contribute and does the Army take

into account her contribution and, if not, why not, and if it is unwritten or if it is written, exactly what is the role of the wife, if in fact she does contribute to a good soldier or a good Navy person?

I was going to ask you Admiral Zech, and I will get back to you on it.

But one of the most frequent reasons cited for leaving the military is too many family separations, especially the Navy, over and over again. That is the principle reason given so far. So family life is very important. She contributes to that particular marriage and to that soldier's career and to his satisfaction on the job. There is no doubt about that.

General WEBB. All of the above.

Senator COHEN. All right. For example, you mentioned the POW. You asked how does a man bounce back in terms of coming back out of retirement and back into the active service. What I want to know is how does a divorced spouse bounce back? How does she bounce back after 15 or 18 years and she has no skills that she can market in the marketplace. What does she do at that particular point.

I see a man behind you shaking his head. Apparently he is not concerned about the woman that is 15 or 18 years in marriage and who has no marketable skills because she has been what, she has been a nomad just like the soldiers have been. She has had to pick up and move around and can't put down, any roots, and she has to move with him and she can't then look over her shoulder and all the young wives of people coming up saying that they are the ones going to get employed and not her.

Now, I want to know if she in fact contributes to that marriage, if she contributes to that soldier's contribution to our defense which I am concerned about, too, as you are, then should she be precluded from considering that as a property right? I don't understand that.

General WEBB. The real question is the property right.

Senator COHEN. OK. You mentioned the POW. That is a tremendous hardship. One of my closest friends, John McCain, that was a tremendous hardship that he underwent. I would submit to you that the wife undergoes quite a hardship at that point, too, because she is left back home with those kids who haven't got a father and she has got the responsibilities of being the father. It seems to me that that is worth something.

General WEBB. There is no question. Separation and divorce is a trauma for both members of a family.

Senator COHEN. Exactly.

General Webb. But the point I was making which I started before you came in, Mr. Senator, is really the challenge that has been passed to the Congress by the Supreme Court is do you want to change the long-held view that military retired pay is a personal entitlement by declaring it community property? That is the challenge that you are considering.

Senator COHEN. I am going to read a couple of personnel evaluation reports for you. Then I have got to go and vote and we will come back and resume it.

When extra duty was required he was quick to ensure that necessary maintenance of supply personnel were available. I must criticize his wife's antisocial actions which led to the disintegration of a group of wives who had been making significant contributions to the company and military community. I, therefore, do not recommend him for future assignments which will be affected by her behavior.

There is one. You said 35 years. Here is another. I am sure you said you could find some more. I will go on.

Technical competence of the highest order. He and his wife did not try to maintain a previously active group of company officers' wives.

Now if you take into account in these evaluation reports he and his wife, his wife's antisocial actions led to the disintegration. She becomes an important factor in the officers' evaluation reports.

General WEBB. She does. We do not preclude that being put in there. We do not encourage it. To answer your basic question, we have no orchestrated way to measure the effectiveness of the wife or her contribution and I don't think we want to have one.

Senator COHEN. Well, but you see a court can take that into account on a divorce settlement, can't it?

General WEBB. Well, of course, that was the basic point that I was raising before I got off on the other, perhaps unwisely. The point I was raising is if the retired pay becomes community property and she in effect or he, whoever the spouse is, has earned a portion of that community property because of the contribution to the marriage, and that seems to be an underlying premise of S. 1214, then how is that going to be determined as to the contribution that was made.

I don't want any part of orchestrating evaluations of wives. I think it is an anathema. But the question remains to protect the service member. If this is by mandate and by Federal law declared community property, then how are you going to protect the service member?

Senator COHEN. What you are saying is if you declare it community property then the court has no discretion as to how he is going to divide that up. It automatically is an arbitrary fixed percentage and she has no range of discretion within that 50 percent.

You don't want to make that decision and I might not want to, but the court does it every single day.

General WEBB. It sure does.

Senator COHEN. So why is this different. Why is it different when the court has to go through and say how much is she entitled to? What kind of a wife was she?

You know, another thing that we have to do in our tort law? When a woman dies, the wrongful death of a wife, the wife killed in an automobile accident, we go through and we say how much is a good wife worth?

General WEBB. A lot.

Senator COHEN. A lot. If you went through and you had to evaluate it, you would find it is well over $30,000 a year. If you had to pick up and buy on the open marketplace every service that is performed, from a seamstress to a washing lady to a cleaning individual, to a caretaker of the children, to a cook, to a chef, a connoisseur, if you had to contract that out, that is a lot of money. That is how they do it in the courtroom. How much is a good wife worth?

Sometimes you get the question of how much is a bad wife worth? Maybe she wasn't quite as nice as this other one, maybe she cheated on her husband, and what kind of a value do we ascribe? Courts do it every single day of the week. It is the toughest job in the world, but they do it. It is something you don't want to do and I don't want to do. That is why I got out of the practice of law. I didn't like it. But they do it, and I think over a period of time you can find that they try

to exercise that kind of impartiality on a case-by-case basis. They do it each time. What did she contribute? What kind of a mother? Did she have to maintain a workload in addition to it? Was she good to her children or bad to them? Was she a good supporter during this time? We have to go through on a case-by-case basis, and I am satisfied courts will do it under this circumstance, too.

But there is the underlying presumption you make that the minute you put it into community property, zap, it is 50 percent and there is no incentive for that man to re-up.

General, you were going to say something.

General BRONARS. I have to tell you that on frequent occasions I see fitness reports remark on the contributions made by the wife. I have never seen a fitness report that remarked on the negative aspects of perhaps her behavior. We are talking more and more in terms of the husband-wife team. There is a lot of voluntary work that the wives do that supports the military community at our major installations, and it is very important work.

As a matter of fact, the individual service member is not judged and assessed on her performance. Of course, a wife has a great contribution that she makes if she is a supportive wife and he has a happy home. He is obviously going to be a better soldier, sailor, marine or airman in my estimation.

Senator COHEN. Can you hold the second part of that answer, because that is the good news. I am waiting for the bad part to come up. I have got to go vote and I will come right back.

We will be in recess for 5 minutes.

[Recess.]

Senator COHEN. The committee will come to order.

General Bronars, at the time that you and I left, you were about to give me the second half of the equation. Before you do so, let me indicate for the people who are here, there is some confusion or at least some lack of clarity in the kinds of questions that are going back between us from the witnesses to the Members of the Senate here of exactly what is the purpose of the line of questioning. Are we satisfied that there is empirical evidence to support the contention of the witnesses? The answer is probably not. But we have called you here asking if there is empirical evidence, not expecting that there would be. I don't think the issues has been really studied thoroughly one way or the other.

We have called you gentlemen because you are professional military men and we are asking for your professional and personal advice. It is not to discount it, but to say this is your personal judgment. I think that that is the basis of it. The fact is it is not empirical evidence and we ought to proceed on that basis.

I and Senator Jepsen and others would weigh it like a court weighs it I suppose. You know, this is your judgment and we can accept it at face value for what it is based upon your personal judgment period. It is not supported by any empirical studies because there aren't any of significant degree.

So that should be the basis under which we are proceeding. We are asking for your opinion and you are giving it to us. We are then charged with weighing that on the scales of what we are trying to achieve which is a sense of equity. All we are really trying to do is to

find out what are the balancing or competing equities in this issue. It may be that we put too low a threshold. I said this in the last meeting that we had, that it may be the threshold is too low. It may be that it has to be raised in order to ameliorate or reduce the kind of anxieties that you gentlemen see. That may be one solution.

I am proceeding on the basis that we are trying to find that illusive thing called the truth as best we can, flawed as our efforts might be. So in that spirit we will come back to the second half of your answer, General Bronars.

General BRONARS. The point I had made before you recessed, sir, was that military spouses contribute to the success of a military career officer or enlisted person just as supportive wives contribute to the success of any individual that is in a career posture.

Having said that, I have seen a lot of comments about the role of the wife in the husband-wife team in fitness reports, all positive reflections on how a wife supported her husband in his responsibilities. I have never seen a derogatory comment about a wife.

I am emphasizing that because in the final analysis, having sat on many promotion boards, I am convinced that an individual is promoted based on his performance of assigned duties and responsibilities.

The second point I would like to make is that there is no one sitting at this table or anyone in a responsible position in any of the services that wouldn't support a position that a spouse in proceedings should receive a fair and adequate decision on the part of the judge to provide for her support and the support of the children involved, particularly if she gains custody of them.

I think our great fear at defining retired retainer pay as community property is that definition could undermine the military purposes that the retirement system is supposed to serve. One of those purposes is to allow the achievement of personnel management goals of the military services.

I also feel that the objective of providing adequately for the spouse and the children in divorce proceedings can be achieved by applying the spouse support, child support and division of personal property as it currently exists. As I understand it, there are only two States that don't provide for alimony, Texas and Indiana.

It would appear to me that in divorce proceedings that, rather than defining retired retainer pay as community property, such pay would be considered by the judge in identifying the type of support that the spouse and, if she gains custody of the children, the children should receive from the other member of the marriage.

It would appear to me that, without undermining the very purposes of retired pay, the divorce courts throughout the land could insure that proper support is provided to the spouse in those marriages.

Senator COHEN. Are you saying that you think the courts ought to take into account what retirement benefits have been accrued by the husband to take that into account in making an award of support and alimony?

General BRONARS. I am saying that the courts would take into account all of the income that both members of the family had. They would take into account all the property that they owned in making a division of that property and they would take into account the responsibilities that each member of that marriage had upon dissolution of

the marriage in coming to a determination of the type of support that would be provided and the type of division that property would take. It wouldn't be necessary to declare retired pay as community rather than a personal entitlement, as it is right now.

Senator COHEN. But you are saying the court could take that amount into account in deciding how much compensation were fair in the way of child support and/or alimony?

General BRONARS. Absolutely.

Senator COHEN. Now do you consider retirement benefits to be a deferred form of compensation?

General BRONARS. I consider retired benefits to be a reduced form of compensation for responsibilities that the individual still has to the Federal Government in terms of mobilization, in terms of his participation in the event mobilization occurs.

Senator COHEN. What I am getting at is don't we in the military as such, as in the private sector or the Government, and we in the Government say that, look, and even the private sector, we are not paying you as much as you would like or we would like to pay you, but we do have a good retirement system, and that is even though you have to accept a reduced form of compensation now, if you stay with the company long enough, if you stay with the Federal Government or in the Senate long enough, if you stay with this particular program long enough, that you will have a fairly attractive retirement system. Do we not say that in effect?

General BRONARS. There is no question in my mind that the retirement system and retired pay is part of the total compensation that ultimately a career military member can expect to receive.

Senator COHEN. So it is in fact a sort of deferred compensation. Much as we do in any other sector of our lives, we say we are taking less now and we are going to get more later. You spread it out over a period of time.

General BRONARS. In effect you can look at it like that.

Senator COHEN. I mean that is what we do. We do look at it that way. Now, do wives and husbands as well as children make certain sacrifices at the present time with the knowledge or foreknowledge that they will receive compensation later? In other words, if the husband, the soldier, gets less pay now, I assume the wife says, well, you know, we could be doing better outside. You wouldn't have to work so hard, you would be home at night, especially in the Navy, and you could make much more money. The husband might say, well, we are having it tough now. It is tough to support the family right now. As we know, as recently as 2 or 3 years ago many people in the service were on food stamps because pay was so low for those coming in. But tough as it is right now, just hold on. Just hold on a few more years and as this thing goes along the line things are going to get better. And, by the way, at the end of that rainbow, at the end of that 20-year period we are going to have a pretty good retirement system.

Now the wife shares in that sacrifice as well, of lower compensation now for the promise of more compensation later at the end of that 20-year period. The children share in that deferred compensation because they go without certain things they might like to have in the way of material acquisitions or whatever, for time to travel or the money to travel.

So what I am getting at is it is not only the husband who is deferring compensation and whatever monetary awards that go with that, the other members of the family also are sharing in that deferral of compensation. That is where I guess we are differing a little bit in terms of our concept. Is it income, is it deferred income, is it a property right or what? The reality of the situation is that you are getting less now than you might want to get, but you are going to get something at the end of that particular time frame and all parties to that family share in that reduction of current income.

General BRONARS. And, of course, you have brought in the sharing by the children, and the parents are responsible for providing adequately for their children as they are growing up. The fact is that the income that the individual receives while on active duty is providing for that family and the wife is sharing in whatever lower levels of compensation he may gain while on active duty as opposed to what he might have gained if he were in the private sector. They accept that.

My concern, as I stated in my opening statement, has to be with maintaining a strong, combat-ready Marine Corps. I do believe that retired pay is a very important part of the compensation system that an individual receives. You made that point. It also is one of our most important incentives for making career decisions, to stay on and continue to serve.

Senator COHEN. But doesn't the wife also make that decision? For example, if I were a spouse of a Marine or of a Navy man, I would say, you know, this is really a pretty tough life and I don't like the fact that we are moving every 2 years or that you are away 9 months of the year.

It seems to me you could go to work at Beth Iron Works or Portsmith Kittery or some other yard as a technician. You could make twice the money and be home for dinner every single night. And the husband says, but, you know, I really like this life and I am making a contribution to my country and therefore I am asking you to stay with me and to help make this a viable family unit because we are contributing to the security of this country. So, it is an incentive, you are right, and I agree, but it is also one that she joins in.

General BRONARS. And you are describing a marriage that doesn't end in divorce in the military. I don't know what percentage of the divorces that occur in the military occur because the wife suddenly comes to the conclusion that she is not going to put up with the type of environment that she has to exist in.

The individual member is committed to service to his country in uniform and he is willing to make the sacrifice, to accept the separations, the long hours, the commitments. And she comes to the conclusion that she is not willing to and she says, Joe, I really have had it with this type of life and I think you ought to get out. And Joe says, no, I am committed to this life and I am going to stay in. And she says, let's split the blanket because I am not willing to support you in that life any longer. That is one of the most prevalent reasons for divorces in the military today.

Senator COHEN. What if I give you the converse. Let's suppose that Joe comes home one night and says, you know, I have made a long, dedicated career to the military and I want to continue, but, frankly, I am fed up with having you as my wife and I want you out. And,

by the way, there is somebody else that I am interested in. What about that situation where he wants the divorce and he just doesn't want to live with her any more?

General BRONAR. There is no question that divorces are precipitated by a variety of reasons.

Senator COHEN. Right. But, see, it is always characterized as that suddenly she wants out and therefore she is not contributing. But it could be the other way around and many times it is, too.

General BRONARS. I don't want to complete my testimony without making a strong point that the vast majority of wives are very supportive of their husbands, that most of the marriages don't end in divorce, that those that do have several different reasons which may cause those divorces, some of them positive on the part of the wife and some of them positive on the part of the husband. Sometimes the husband is at fault for the divorce proceeding. Sometimes there is just incompatibility and they can't get along with each other and it has nothing to do with service life.

All I am saying is my main concern is that the purposes of the military retirement system are not subverted by defining military retired pay as community property, as opposed to what we perceive it to be now, as a personal entitlement. That is my main concern.

Senator COHEN. But you have no problem if we call it deferred income and have the court take that into account in making an award as long as we don't call it community property.

General BRONARS. I would rather do that.

Senator COHEN. Thank you.

Senator JEPSEN. General Webb?

General WEBB. I didn't finish, sir, if I might, because I had reached the point that the Senator has just been discussing, the role of the wife. I can say, as did General Bronars, that we are very proud of Army wives and that is a sincere feeling. Mine has moved 28 times with me with nearly 15 years of it overseas, most of which she was with me, and three of our four children were born overseas.

But, you know, the Army is changing as is society. The Army has been overseas for nearly 40 years since World War II and we have got about that same percent, 40 percent of our people overseas and that causes repetitive tours. It is the same thing the admiral talked about, Admiral Zech. That is the nature of Army life or service life.

At the same time, our wives in many, many cases are extremely talented, sometimes more so than their husbands undoubtedly. They have upward mobility, they have desires and they have intelligence, and at times they grow roots. They want to stay sometimes for economic reasons.

So as contrasted to the time I came into the service where wives did march relatively freely, it is more difficult for them to do so, and that is the nature of the beast. That does contribute in some way to divorces, as General Bronars talked about, but there is one thing I want to make very clear. The Army does not countenance and support those people, either active or retired, who do not live up to their commitments in accordance with a properly adjudicated court decree.

We are growingly frustrated and sensitive to that issue, and I do have some suggestions to the committee on that. In any event, families do break up and the obligation is with us, as I said.

I would like to recall some of Senator Denton's comments in the previous testimony. I think he gave a wise caution. "Because these fine men and women are governed by Federal law in almost every aspect of their lives, they are, in a sense, hostages to the wisdom of the Congress." Further, he cautioned that——

Senator COHEN. You are hostage to the wisdom of this Congress every single year we vote on military pay.

General WEBB. Absolutely, and of course his discussion on this issue was on a much narrower stand.

Senator COHEN. What I am saying is that everybody is hostage to the whims and caprice and arbitrariness of your elected representatives.

General WEBB. Sir, you said that. I didn't say that. [Laughter.]

Senator COHEN. I stand by that.

General WEBB. In any event, the Senator did caution, particularly with respect to young spouses—and this is a concern and there was a discussion in previous testimony—that were divorced, that giving them by Federal law a portion of the service member's retired pay could "be defended only by the most tortuous of arguments."

"To help our deserving minority," he said, "One must guard against causing injustice to a majority." And that is a concern. Further he commented, "The best we can hope to do is limit the Federal Government's role in this unhappy business to a minimum."

Senator COHEN. Did you conclude that Senator Denton is opposed to this bill?

General WEBB. No, I did not, because I read his initial comments. He had an open mind. These were comments he made on it and he very explicitly stated he had not made up his mind.

So in essence how do I conclude on these issues because I posed two of them, protecting the rights of the service member and assuring that we protect the rights of the spouse, active, retired or ex-spouse?

I consider that the basic decision of *McCarthy* is sound and supports the past intent of Congress and also protects the service member. The judicial system of our Nation and its States presents through its judges equitable and just treatment of parties brought before it in divorce cases.

Each case brought before a judge is an adversary proceeding with an array of causes, family factors and economic variables which only wise counsel at State levels can adjudicate justly and equitably.

I notice also that Dr. Korb in earlier testimony succinctly summarized S. 1814 as "an effort to fill a void in State laws, particularly where there is no alimony." He noted that S. 1814 also seeks to provide for prospective payments without costly, time-consuming procedures. And, as he said, perhaps more approppriately the issue "should be changed in State laws."

I conclude that no national statute is necessary, and that as difficult as some divorce proceedings are, our system best balances the interests of the service member and ex-spouses.

The Department of Defense, perhaps in concert with the Congress, can strengthen the mechanism to assure that adjudicated court directives are met by the service member, both active and retired, to assure that ex-spouses are properly treated. There are some suggestions we could make to changing certain laws to include the Soldiers and Sailors Civil Relief Act.

That concludes my statement.

[The formal prepared statement of Major General Webb follows:]

PREPARED STATEMENT BY MAJ. GEN. WILLIAM L. WEBB, JR., ASSISTANT DEPUTY CHIEF OF STAFF FOR PERSONNEL, DEPARTMENT OF THE ARMY

The Department of the Army has deep and abiding concern for the interests of service members and family members alike. Our mission is national defense—a function whose primary focus is on service members. However, we do not abandon family members in our plans and programs nor do we condone callous service members who ignore responsibilities to their families.

As did the Secretary of Defense, we realize the dilemma presented by the Supreme Court decision in *McCarty* and its comment that Congress may want to address the issue of affording more protection to a former spouse of a retired service member. S. 1814 is a conscientious attempt to provide a comprehensive solution; nevertheless, we do not believe its provisions properly balance aspects of protection of former spouse and service member and needs of the Services.

On 10 March 1982, Doctor Korb appeared before this Subcommittee. As the office of the Secretary of Defense witness, he presented a Department of Defense position on S. 1814 which concluded that the Department would not oppose enactment of that legislation if recommended changes were made. The Department of the Army supports the established Department of Defense position.

Senator COHEN. General Webb, let me ask you, do you agree with General Bronars that you have a problem with this issue as a property right but that retirement benefits should be construed as a form of deferred compensation which the courts could take into account in awarding alimony and support payments?

General WEBB. I would yield to the Congress, sir, on that, because the Congress appropriates the money and defines what it is for and that is part of the issue on *McCarty*. Well, I don't think I do agree with that, if you want my personal opinion, which is what you asked for.

I think that the Supreme Court's look at what the Congress has done in the past is correct. It is compensation, it is not property; and it is a retainer fee that serves in the event that individual needs to be recalled.

Senator COHEN. What you are saying is you agree it is compensation.

General WEBB. Yes, I do.

Senator COHEN. And that the courts, if Admiral Zech is correct, should consider this on a case-by-case basis. Do you agree with that?

General WEBB. I do agree with that. That is a key point, that I think the courts have and should and in general do adjudicate wisely considering the facts in the case.

Senator COHEN. But the way in which *McCarty* has come down is they can't consider that in those States with the community property rights. That is sort of off base for them. There is no judicial consideration there. So they don't have a chance to get at it on a case-by-case basis as a result of that decision.

What I am trying to find out is if it is just a question of defining it as a property right, as community property, if that is the major objection, then let's call it something else. Let's call it what you call it. Let's call it compensation, a form of deferred compensation which in fact can be taken into account on a case-by-case basis by a court to say that this is the amount of money that has been accumulated and we think under the circumstances, because of her performance or lack of performance, she would be entitled to this amount of money and allow the court to make an evaluation based upon the deferred compensation which has been accumulated. That would be a fairer system as far as you are concerned?

General IOSUE. My hangup is simply the property feature. I am fearful of the consequences of retired pay being classified as property. Call it what you want. Have it taken into consideration, and the maintenance of the ex-spouse through alimony, that is fine. We have three States now that are inflexible in their distribution of property. You put retired pay in that classification and 50 percent of the time that the spouse served with the member is going to be divided regardless of the circumstances of the divorce.

Senator COHEN. So let's not call it property. Let's call it income.

General IOSUE. Call it deferred compensation. The thing we need to guard against, in my view, is having it interpreted as property and treated as property.

Senator COHEN. But a court can take that into account, make an evaluation and ask the Army, the Air Force, the Navy and the Marine Corps to come forward and say give me your projected benefit of this retirement so that we can take it into account in making an award for alimony and support?

General BRONARS. I would like to just enter right there because if you are talking in terms of compensation, yes, it is compensation that will be available to the member if he completes 20 years of service and if he retires after 20 years of service. At that time he will become eligible for certain retired pay.

Senator COHEN. Assume it is a property right. Still the court can't make the award before he has got the money.

General BRONARS. Let's assume that the divorce takes place after 15 years of service. At that time he has certain income. Certainly the potential of his becoming eligible for retired pay doesn't increase that income. So I don't presume that the court would need to have some sort of reflection from the service as to how much value that has as of that date so that it could be considered by the court for the type of spouse or child support that would be awarded.

Senator COHEN. The court could say, Mr. Jones, we have looked at your records now and we know that your income is $300 or $400 a month or higher and we know you have got the following fixed obligations. We know that you are entitled, if you complete your 20 years of service, to x amount of dollars in retirement benefits. Taking that into account, your 15 years of marriage, we think it would be fair and equitable for you to go out and take out a loan in anticipation of the retirement benefit that you will receive and apply that to your monthly allotment on alimony or support.

General BRONARS. It is not unusual for someone at 10 years of service or 15 years of service to be discharged in advance of reaching the 20-year point. It is not unusual for an individual to have some physical disability that disallows them to continue. It is not unusual for an individual to become involved with some situation that requires the service to discharge him in advance of that. It isn't something that the courts could depend upon happening and therefore I don't think it would be fair for them to apply an assessment of its value that then could be awarded to the spouse at the time that the divorce takes place.

Senator COHEN. It could be an incentive for him to stay in to make sure he gets the retirement pay at all. What I am getting at is you don't want to call it community. You recognize it as a form of deferred compensation which all parties share. Now you are saying that the

court really couldn't take that into account in making an alimony or support award if he doesn't have the money.

So we are back to square one where she gets no share at all in that. In essence, she gets no share at all. Even though it has been deferred compensation and even though she has made part of the sacrifice over the years that they have been married, depending upon what we put as a threshold, she does not share at all in that particular award.

Now is that fair do you think?

General BRONARS. If the court made a determination that one of the members of that marriage which was dissolving was to provide spouse support and child support over a period of time and the divorce took place prior to his reaching retirement age, it certainly would allow him to continue that spouse support and child support in the event that he did retire. His income would be assured. But it doesn't provide him any additional income prior to retirement. As a matter of fact, his income goes down after retirement and there is no assurance that he is going to get a second job. So I don't see how it could be applied in terms of his ability to provide support for the spouse or the children.

Senator COHEN. What about another option. Suppose the court decides that we can't apply it on the monthly payment to the wife and we will fix alimony at $100 a month but we will leave the question of what alimony is open indefinitely so if and when the retirement does in fact accrue and he is entitled to it then I will entertain a motion to reconsider the alimony award. Do you think the courts would do that?

General BRONARS. I think, having knowledge an individual ultimately may achieve retirement status, that the courts might take that into consideration as to the duration of the alimony award. I just can't see that potential retirement pay would contribute to the ability of the individual to provide for spouse or child support at the time the divorce took place.

Senator COHEN. What I am suggesting to you is it may not, that what the court might do is find a way to arrive ultimately at a decision saying I will keep the alimony question open permanently and if and when such time as that benefit does accrue at the end of that 20-year period, then I entertain a motion to increase alimony. By the way, that is the rule of law anyway. That is the current rule of law.

General BRONARS. I would think that would be at the discretion of the judge.

Senator COHEN. The court can keep it open. I am just going to read something to you. The District Court of Appeal of Florida upheld a lower court award of permanent alimony to the wife a sum equal to one-half the net retirement pay that the husband receives from the U.S. Air Force. The court further ordered that the sum shall be a charge against his estate to the extent his estate receives any death benefits attributable to the husband's retirement upon divorce.

So the courts are going to find a way to deal with this issue. What I am suggesting to you is if we call it compensation and don't deal with it as a community property right, then you are going to see other efforts made, perhaps more creative and perhaps more arbitrary or whimsical, to find other ways to take into account what that retirement benefit is going to be through a permanent award of alimony, through expressly stating that the question will remain open, that

they will continue to look at it to see if it shouldn't be increased as soon as the husband becomes entitled to the money.

So I don't think what you call it is really important. The question is really going to be is there any equitable way of resolving the issue. To say that they are not entitled to it period, without any consideration of her role, I don't think is particularly fair. If he can't pay for it then but he has a nice retirement coming, that is an equity done.

Suppose the kids are grown. Suppose they are 18 or 19 and they have gone and his obligation ceases and desists and all he has got is his income and they have a divorce. He hasn't been able to accumulate much in the way of property but he does have a nice retirement benefit. What we are saying is we take no action she gets nothing on that; zero. I don't think that strikes me as being particularly fair.

General Webb?

General WEBB. May I make three points, sir.

Senator COHEN. You can make four. [Laughter.]

General WEBB. Well, three is enough right now, sir. You asked a while ago about the term "deferred income." In thinking this through, I think a better affixation if you are looking for another label would be present compensation for reduced services.

I think it is more than a label, which is the second point, because it is my understanding in community property States that deferred income and community property have the same meaning. So I think the label that you put on it, as we have discussed it, could be important. I just would not subscribe to calling retired pay deferred income.

Senator COHEN. You want to call it what, present compensation for reduced services?

General WEBB. Present compensation for reduced services.

Senator COHEN. There is no present compensation for reduced services.

General WEBB. For the retiree.

Sentor COHEN. Right, but there is no present compensation. He doesn't start when he suddenly retires. He builds that up. He can't take it. There is no present compensation for reduced benefits.

General WEBB. On the other hand, if he does not finish exactly 20-years service, as an example, he gets zero. So you could argue that both ways. My only point on that, the deferred income, is I think I would have to look very carefully at the litigous point of view because it is my judgment that in community property States deferred income and community property have the same meaning.

The third point I would make, and I would go back to what I inferred, from what Senator Denton said, is that to help the deserving minority one must guard against causing an injustice to the majority.

It would seem to me, and I come back to the point, that *McCarty* is the law of the land and the question is as to whether the Federal Government wants to change the State statutes. I personally feel we should go with the State statutes and let them seek their own level. The changes as I understand them would be applied to cause community property States to make changes or, to put it another way, in S. 1814 would give them the prerogative of changing, which could well act to the adverse advantage of the many. I think that is what Senator Denton was saying.

Senator COHEN. But the Federal courts, the Federal judicial system did change the law of the land for other States. The long arm of the Federal Government through its judicial system has changed what otherwise was a procedure in a number of States. So we have the Federal arm being extended. What they did was interpret the intent of Congress.

General WEBB. That is correct.

Senator COHEN. So Congress must have had an intent. To say that Congress had an intent when it passed the law does not preclude Congress from saying that it wasn't our intent. If it is, we had better change it.

General WEBB. That is the challenge. I guess the point is Congress has not traditionally, at least in my layman's judgment, passed judgments on personal property insofar as the courts are concerned.

Mr. PRINCIPI. If I can make a few short, hopefully, clarifications to some of the things that have been said with respect to S. 1814.

S. 1814 is not designed to be a national divorce law. It is not designed to fill any void left by the States. It is designed, however, to return to the States the prerogatives that they had prior to the *McCarty* decision with limitations to protect your Federal interest, such as that the States could not award under any circumstances more than 50 percent to an ex-spouse.

If a State does not have community property, if a State does not have alimony, S. 1814 does not provide it. There are 39 States that are equitable distribution in our country. Those States divide property based upon the equities of the marriage. There are eight community property States. Five of those eight divide community property and they consider retired pay as community property according to equity. There are three States that do not give the discretion to the State judges with respect to equity. If military retired pay is considered as community property, they have a formula that they apply.

However, very few cases actually get before the court. You take California, for example, during the negotiation process in property settlements the two parties decide whether the wife will receive a percentage of retired pay or the husband will keep it and she might take the house or some other property instead. That is why there are very, very few cases, case law, on appeal because they really very seldom get to the court.

So the point is that I think S. 1814 is not trying to grant an entitlement to an ex-spouse. It is basically giving to the States, the States that have the expertise to divide property between the spouses that prerogative.

Senator JEPSEN. Do any of you have any final statement?

General WEBB. I would like to make just one, sir, with relation to——

Senator COHEN. I told you you had four points to make. [Laughter.]

General WEBB. You were right, sir.

With respect to S. 1814, I have read it carefully, I have read the previous testimony and I have read the Department of Defense input. There is one very, very critical point that were this bill to pass that I think should be made. There should be no room for doubt that there should be, in my judgment, no retroactivity to that bill, none what-

soever. The bill should not take place until such time as it might be passed by the Congress in whatever time in the future that it should be.

I have discussed this at great length with legal counsel. A retiree asked me a short time ago, he said I was married 20 years ago and 15 years ago I divorced somebody. Does that mean that she might reopen that? I said I was not sure.

I have read the testimony about that there might be some retroactivity. I just say that with the way it is written, this would become a lawyer's morass, in my judgment. That is the one last point I will make, that there should be no retroactivity at all.

Senator COHEN. Does that cut both ways?

General WEBB. It does cut both ways.

Senator COHEN. Let me read something to you. Let me read an ad to you that appeared in some publication in California.

It says:

Divorced in California prior to June 26th, 1981? If you were and the court awarded part of your retirement to an ex-spouse, then there is a substantial possibility we may be able to get you relief from that burden of any such judgment. On June 26, 1981, the U.S. Supreme Court decided *McCarty* against *McCarty* which held that the military retirement was a personal entitlement of the retiree and was not divisible as community property. The Supreme Court has yet to decide whether the *McCarty* decision is fully retroactive.

Then there is a big caption here.

But even if it was not, we have developed a legal approach of setting aside that pre-*McCarty* judgment, which does not depend upon *McCarty* being retroactive. You owe it to yourself to see if there is a way you can keep your whole retirement check rather than part of it. Call right now for a consultation. Law offices of Russell Jungerich.

He is going to be rich. [Laughter.]

General WEBB. Malpractice suits for the lawyers that might have participated in cases in the beginning. That is why I say that it takes wise legal counsel to do that. But my personal judgment, and this is on the advice of counsel, is that we might well be very, very specific and have no retroactivity.

General IOSUE. Well, I think I have made the points that I intended to make, and that is I applaud your suggestion, and I think that perhaps the fall-back position would be to confer interest in retired pay and insure that it is not classified as property because of all of the concerns that have been expressed here and have it taken as such in the determination of the amount of maintenance support for an ex-spouse.

Senator COHEN. It wasn't a fallback position of mine. I was just asking if there was intellectual disagreement with it. Thank you very much.

Senator JEPSEN. Admiral Zech?

Admiral ZECH. I would just like to say, Mr. Chairman, that we are very proud of the contribution of our spouses to our Navy, as I have indicated earlier. The long deployments and the hardships on our Navy families do indeed cause problems in some cases. In many cases they solve this problem by leaving the service and we therefore lose some very, very fine Navy people who want to keep their marriages together and therefore leave the service to do that.

We recognize the tensions involved and we want to do everything

we can to keep our Navy families together. We certainly do not want them to choose to leave the service to do that.

But when it does come time that they, for various reasons, choose to get divorced, I do feel that it is a very personal tragedy and I would prefer that we could talk today on trying to keep families together rather than separating them. If they do separate, I do feel that we should use our collective judgment, our good wisdom and our fairness in any and every way we can to support both sides in that very tragic occurrence.

I would only say that my personal concern is that in my responsibilities to the readiness of our Navy and the continued operational strength of our Navy this is an issue that does have a bearing and we want to look at fairness to both individuals as well as the operational strength of our Navy.

I believe that the important issue, although there are other modifications that we could discuss, but the most important one I believe is whether or not it should be community property. I would have no fault in calling it income in any circumstance and have it judged by the court accordingly. But defining it as community property does concern me because it could lead to arbitrary decision. Therefore, I believe that some way or another we should find an answer to take care of this tragic situation in fairness to both parties.

My reasoning is that we can find the solution by the term "income." I would be a little bit concerned, Senator Cohen, about the term "deferred compensation." I would honestly have to study the impact of that definition, but I would certainly not have a problem with calling it income in some form, because I do believe that spouses should be taken care of and their husbands have a responsibility to do that which the Navy would certainly support in the court.

My only concern is the aspect of community property, which could lead to automatic and arbitrary decisions and I don't think we should go in that direction.

Thank you, Mr. Chairman.

Senator JEPSEN. General Bronars?

General BRONARS. If Major General Webb's definition of deferred compensation is indeed as he stated a definition of community property, I would hesitate to use that term then and would not subscribe to its use, and I would support Admiral Zech's terminology of income of some nature that could be considered by the courts.

I would make only two observations relative to Senator Jepsen's bill.

If it is indeed considered necessary to have legislation of this nature, I would strongly recommend that the period of 5 years be increased to somewhere in the neighborhood of 15 years. I believe that type of useful participation in service life is important to insure that the wife and the husband have made that contribution with those sacrifices that you have recognized as being mutually made.

The second point I would make is that I think it is important to provide in that legislation for prospective enforcement only and not make any provisions retroactive if indeed the Congress feels that it is necessary to pass legislation of this nature.

It has been enjoyable to participate in this hearing. [Laughter.]

Senator COHEN. We have enjoyed it, too, General.

Senator JEPSEN. Senator Exon, the ranking Member of this subcommittee, does have a question that he has requested be asked before we adjourn, and I refer now to staff to ask that question.

Senator COHEN. Can I just say, Mr. Chairman, I thought I left this all behind when I left the practice of law. [Laughter.]

Mr. BESOZZI. Thank you, Mr. Chairman.

The question just relates to a point that both General Webb and General Bronars made a minute ago, and that has to do with retroactivity of the legislation. Indeed, the issue of retroactivity was left open by the Supreme Court in *McCarty* and I think, as Senator Cohen points out, there have been solicitations already to reverse early agreements, and indeed some States have started applying the *McCarty* decision retroactively.

I am concerned that if this legislation does not put the law back to what it was on June 25, 1981, that we are going to precipitate a race to the courthouse, so to speak, before the legislation becomes effective by all those who would be interested in getting a final divorce decree and sheltering their retired pay. That is why I think it is important that we try to fashion some legislation that is retroactively applicable.

I wondered if General Bronars and General Webb would comment on whether they have any concern about creating a situation where those who might be at some point considering getting a divorce would be urged on by the fact that this legislation would only be prospectively in application and they could shelter their retired pay by getting a divorce before it became effective.

Senator JEPSEN. Let the record show that these questions were asked for Senator Exon by Paul Besozzi, minority counsel.

You may proceed, General Webb or General Bronars to respond.

General WEBB. I will comment on that. If I understood the question accurately, I reassert my original position that there should be absolutely no retroactivity. There may be, although I certainly have not sensed it from any reports within the Army, a great rush of encouragement to run to the courthouse. We all recognize that it certainly takes time to get into a courthouse and time to sit on a case in the first place.

My concern is that even if that were so, it would pale into insignificance in the deluge that would hit the State courts of this land, both the State courts and the appellate courts, if it were made retroactive. That is my judgment.

Mr. BESOZZI. Well, you are already seeing retroactivity I think, as Senator Cohen pointed out, on one side, and I think there is evidence here that the retroactivity aspect is of grave concern and there would be a precipitation toward the courts to alleviate this problem.

General Bronars, do you have a comment about whether or not prospective legislation could encourage people to get divorces?

General BRONARS. I don't believe people get divorced simply because the Congress passes legislation that seems to benefit one side or the other. Divorces occur because of incompatibility and a variety of reasons. I don't believe that the instances that you think would occur would be very large in number at all.

I agree with General Webb that if this type of legislation were applied retroactively that there would be large numbers of cases reopened, and it could go back for many years I would presume.

Mr. BESOZZI. It would only go back to June 25, 1981. That would be the date that the legislation, if it were made retroactive, would apply to. It would be an attempt to put the law back to what it was the day before *McCarty* was decided.

General BRONARS. Well, having given me that thought, if the legislation would have a provision that it could be applied retroactively to that date and not prior to that date, I could subscribe to that.

Mr. BESOZZI. What about you, General Webb?

General WEBB. I would not subscribe to it. I would adhere to my original point of view. We have seen that a lawyer, as the Senator said, is broadcasting for business on the assumption that it might come. I think if the Federal statute enters into the State court business, that the great number of lawyers that we have in this land with their energetic application of law, will take many cases before the courts. I may be wrong. I am not a lawyer.

Mr. BESOZZI. Well, we would only be putting the law back to precisely what it was on June 25, 1981.

Thank you for your answers.

Senator JEPSEN. I want to thank you all for coming. We all owe you our thanks. In a democracy of a country like ours we air these things and we talk about them. I think we should all keep in mind in perspective that 10 months ago this didn't exist and then a judicial body made a decision and then made a statement in addition to a decision which suddenly brought all this into the fore.

I have one yes or no answer final question before we adjourn, and that is in this bill we provide that after 20 years of service, we have a provision that provides some amount of health care. It is automatic. Could you just tell me, do you oppose it, not oppose it or support it?

General IOSUE. I support health care.

General WEBB. As written I oppose it.

Admiral ZECH. I would support some form of health care for the ex-spouses, Mr. Chairman, especially for those who have serious health problems.

General BRONARS. I would support a form of health care. I would prefer that form to take an insurance program perhaps sponsored by the Federal Government.

Senator JEPSEN. General Webb, may I ask you, do you support the complete full-blown health care for the new spouse then?

General WEBB. Do I what?

Senator JEPSEN. For the new spouse after the divorce for the person that has remarried. The health care, and we are making a situation here, that for 20 years that this divorced spouse had helped accumulate, that automatically goes full-blown to the new spouse under the present arrangement. Since you do not support any health care for the old spouse, do you support complete health care for the new spouse?

General WEBB. I will answer your question, but I much challenge the assertion at the beginning, sir, because you asked the question did we agree with what was in S. 1814 and my answer was the same as Dr. Korb gave, no I don't as it is written.

Now I will answer the second question, and I come back to dental care as an example. Many of the wives or the spouses as they may be

on active duty or retired duty have no rights to dental care at all, period. Your bill in that context would accord to divorced spouses a medical privilege in dental care that is not accorded to those on active duty or retired, and that is part of the concern that Dr. Korb expressed and why he said we needed to look at that very difficult issue as a package.

Mr. PRINCIPI. If you are correct, and I don't think you are, for how long would that individual, that ex-spouse receive dental care or even health care under S. 1814 as presently drafted?

General WEBB. I would have to turn to the bill and read it, and I have it right here.

Mr. PRINCIPI. Well, it is a 90-day transition period, unless the ex-spouse had a serious illness like heart disease.

The second question that the Senator asked, do you support the new spouse after retirement receiving full health care for the rest of her life?

General WEBB. A new spouse.

Mr. PRINCIPI. If the retiree is divorced and remarries his new spouse is entitled to complete health care. Do you support that?

General WEBB. In accordance with what the Congress has authorized, yes. That is the authority currently granted by the Congress.

Mr. PRINCIPI. I am not asking you that.

General WEBB. Yes, I do. But I would make the point about dental care, just so there is no question about it. It is absolutely correct that many spouses of active duty personnel and retirees are not authorized to dental care, and that is the key point that I would make.

Senator JEPSEN. Thank you very, very much, gentlemen.

[Questions with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR J. JAMES EXON

RETENTION

Senator EXON. General Iosue, please provide a detailed discussion of the study conducted by the Air Force on which you base your statement that enactment of S. 1814 will result in the loss of 2,000 Air Force careerists in the first year after enactment and 500–1,000 per year thereafter.

General IOSUE. See attached.

STUDY ON IMPACT OF FORMER SPOUSE RETIRED PAY LEGISLATION ON AIR FORCE

Air Force survey (Atch 1) conducted in February 1982 to assess the attitudes of the force toward proposed legislation to divide retired pay in separation/divorce: Random sample of 1,770 officers and 3,570 enlisted: sample scientifically drawn to assure 95 percent confidence in obtaining data that would accurately reflect the officer and enlisted forces as a whole, plus accurately reflect the data by the TAFMS year groupings (question 1 of survey); survey results were then applied to total officer and enlisted force numbers to extrapolate data for the entire Air Force as follows:

	Years of service					
	0 to 4	5 to 8	9 to 12	13 to 19	20 plus	Total
Enlisted	13,500	17,000	14,600	23,000	10,100	78,200
Officer	1,200	1,600	2,000	3,900	2,400	11,100
Total	14,700	18,600	16,600	26,900	12,500	89,000

Approximate grade distribution of divorced members

E–1	1,000	O–1	400
E–2	1,300	O–2	800
E–3	8,200	O–3	3,500
E–4	14,000	O–4	3,000
E–5	26,000	O–5	2,800
E–6	16,000	O–6	570
E–7	9,000	O–7+	30
E–8	1,600		
E–9	600	Total	11,100
Total	78,200	Grand total	89,300

Responses to survey indicated that approximately 33,500 members would change their career intention and separate from the service if legislation passes: In addition, about 55,000 would change from "career" to "undecided." Realizing that separations of this magnitude are highly unlikely, we decided upon further analysis to arrive at a more reasonable estimate.

STEADY STATE

Probable impact of the former spouse retired pay legislation can be projected by analyzing the decrease in lifestream earnings that will result from such a measure:

married 6 years: (.15) (6/20) (.50) = .0225
married 11 years: (.15) (11/20) (.50) = .04125

and therefore

number enlisted lost = (.94) (1.8) (.0225) (5,100) + (.94) (1.8) (.04125) (3,500)
= 194 + 244 = 438

Officers

number officers lost = (change in retention rate) × (number officers in group)

but

(change in retention rate) = (.94) (1.0) (percent change in lifestream earnings)

where

percent change in lifestream earnings is:

married 6 years: (.225) (6/20) (.50) = .034
married 11 years: (.225) (11/20) (.50) = .062

and therefore

number officers lost = (.94) (1.0) (.034) (700) + (.94) (1.0) (.062) (575)
= 22 + 34 = 56

for an expected total of 494 separations.

(Note: If 7 and 12 are used vice 6 and 11 for "years married" the number of enlisted lost becomes 493 and the number of officers lost becomes 63, for a total of 556.)

Steady state estimate of 500 separations per year is conservative since it considers only those who actually divorce (i.e., does not include legal separations or those who view themselves as potential candidates for divorce).

IMMEDIATE IMPACT

To correctly quantify the immediate impact, we sum the following:

1. Impact from new divorces during first year after enactment (i.e., "steady state").
2. Impact on those divorced since the *McCarty* decision.
3. Impact on the remainder of the force.

Impact No. 1 will be approximately 500 separations (from above analysis).

Utilizing U.S. Department of Health and Human Services Publication No. 81–1403 (National Estimates of Marriage Dissolution and Survivorship) and current force marriage distribution data we estimate that 35 percent of careerists will have their marriages end in divorce.

Using annual probabilities of divorce and the steady state year-of-service distribution we can project that the annual new divorce distribution among careerists will be:

	Number of divorces	
	Enlisted	Officers
Duration of marriage:		
5 to 9 yr	5,100	700
10 to 19 yr	3,500	575

Average enlisted member has served for 11 years and (with a 10 percent discount rate) his retired pay represents 15 percent of the present value of his future lifestream earnings.

We also know that the retention rate of this group will react to compensation changes with an elasticity of 1.8 (i.e., a 1 percent change in compensation will produce a 1.8 percent change in retention) (.94 is the average retention factor for this YOS group).

Average officer has served for 13 years and his retired pay represents 22½ percent of the present value of his future lifestream earnings.

Average retention factor for this YOS group is also .94 and appropriate elasticity is 1.0.

We next make the following assumptions:

(1) The average member who had been married 5–9 years at the time of divorce had been married 6 years;

(2) The average member who had been married 10–19 years at the time of his divorce had been married 11 years.

The expected number who will separate follows directly since:

Enlisted

number enlisted lost = (change in retention rate) × (number enlisted in group)

but

(change in retention rate) = (.94) (1.8) (percent change in lifestream earnings)

where

percent in lifestream earnings is:

Impact No. 2 will also be approximately 500 separations since roughly one year has passed since the *McCarty* decision:

Impact No. 3 may be determined from the survey data;

For the force at large, the survey indicated that previously committed careerists would change their intent as follows:

TABLE 1

	Years of service			
	5 to 8	9 to 12	13 to 19	Total, 5 to 19
Change to separate:				
Enlisted	14,000	8,000	8,000	30,000
Officer	1,400	900	1,200	3,500
Change to undecided:				
Enlisted	19,000	13,500	14,000	46,500
Officer	2,800	2,400	2,800	8,000
Total	37,200	24,800	26,000	88,000

But we estimate that between 5 and 10 percent of our current divorced population were divorced post-*McCarty* and are embedded in these numbers.

TABLE 2.—CURRENT DIVORCED/PREVIOUSLY DIVORCED POPULATION

	Years of service		
	5 to 8	9 to 12	13 to 19
Enlisted	17,000	14,600	23,000
Officers	1,600	2,000	3,900
Total	18,600	16,600	26,900

Using 10 percent, these numbers would be:

	Years of service		
	5 to 8	9 to 12	13 to 19
Enlisted	1,700	1,460	2,300
Officers	160	200	390
Total	1,860	1,660	2,690

Subtracting these from the previous data in table 1, we then have the following:

	Years of service		
	5 to 8	9 to 12	13 to 19
Change to separate	15,400	8,900	9,200
Change to undecided	21,800	15,900	16,800
Total	37,200	24,800	26,000
Less "McCarty"	1,860	1,660	2,690
Remainder	35,340	23,140	23,310

It is, of course, difficult to say how many of these people we would actually lose; however, it seems extremely conservative to say that we could lose one-half of 1 percent of the 13–19 year-of-service group (resulting in projected losses of 116).

But from historical data, we know that the 9–12 year group reacts to pay changes 2.5 times as strongly as the 13–19 year group (elasticity 2.5 times larger), while the 5–8 year group reacts 5 times as strongly as the 13–19 year group, thus the probable number of separations would be:

5–8 years, (35,340) (5) (.005)—883.
9–12 years, (23,140) (2.5) (.005)—289.
13–19 years, (23,310) (.005)—116.

for a total of 1,288 expected separations for impact No. 3.

Under this assumption, the total immediate impact would be 500+500+1,288, or about 2.300. Alternatively, if we use 1 percent instead of one-half of 1 percent, impact No. 3 becomes 2,575 and the total immediate impact becomes about 3,600; if we use 5 percent, impact No. 3 becomes 12,900 and the immediate impact becomes about 13,900.

ALTERNATIVE METHOD OF CALCULATING IMMEDIATE IMPACT

Probable impact of the former spouse retired pay legislation can be projected by analyzing the decrease if lifestream earnings that will result from such a measure.

Potential threat—78,200 enlisted and 11,100 officers could be impacted directly—i.e., divorced, legally separated or have previously been divorced (conservative, since does not consider those who may view themselves as potentially having marital problems)—estimate that 5–10 percent of these individuals were

divorced, separated or divorced/remarried since the *McCarty* decision (June 1981)—average enlisted member has served for 11 years and (with a 10 percent discount rate) his retired pay represents 15 percent of the present value of his future lifestream earnings.

We also know that the retention rate of this group will react to compensation changes with an elasticity of 1.8 (i.e., a 1 percent change in compensation will produce a 1.8 percent change in retention) (.94 is the average retention factor for this YOS group).

Average officer has served for 13 years and his retired pay represents 22½ percent of the present value of his future lifestream earnings.

Average retention factor for this OS group is also .94 and appropriate elasticity is 1.0.

We next make the following assumptions:

(1) Large majority of impact of legislation will fall upon those members whose marriages lasted between 5 and 19 years (impact on others not considered here); reduces enlisted number from 78,200 to 37,000 and officer number from 11,100 to 5,400.

(2) the average member who had been married 5–9 years at the time of divorce (23,400 enlisted and 3,200 officers) had been married 6 years.

(3) the average member who had been married 10–19 years at the time of his divorce (13,600 enlisted and 2,200 officers) had been married 11 years.

(4) no particular assumptions were used here concerning individual differences in state divorce laws since the legislation is viewed as a potential threat to all.

(5) all members who fall into the "divorced, separated or divorced/remarried" category could potentially lose a portion of their retired pay regardless of whether their divorce occurred before or after *McCarty* decision.

Note: Assumptions 1, 2, and 3 will tend to understate the amount of retired pay "at risk" and thus understate the negative impact, assumptions 4 and 5 may tend to overstate the impact; taken together, they should even out

the expected number who will separate follows directly since:

Enlisted

Number enlisted lost=(change in retention rate) × (number enlisted in group)

but

(change in retention rate) = (.94) (1.8) (percent change in lifestream earnings)

where

percent change in lifestream earnings is:

married 6 years: (.15) (6/20) (.50) = .0225
married 11 years: (.15) (11/20) (.50) = .04125

and therefore

number lost = (.94) (1.8) (.0225) (23,400) + (.94) (1.8) (.04125) (13,600)
= 890 + 949 = 1,839

Officers

Number officers lost=(change in retention rate) × (number officers in group)

but

(change in retention rate) = (.94) (1.0) (percent change in lifestream earnings)

where

percent change in lifestream earnings is:

married 6 years: (.225) (6/20) (.50) = .034
married 11 years: (.225) (11/20) (.50) = .062

and therefore

number officers lost = (.94) (1.0) (.034) (3,200) + (.94) (1.0) (.062) (2,200)
= 102 + 128 = 230

for an expected total of 2,069 separations

(Note: If 7 and 12 are used vice 6 and 11 for "years married" the number of enlisted lost becomes 2,075 and the number of officers lost becomes 259, for a total of 2,334.)

These estimates should be viewed as a lower bound for the probable impact since they are conservative in their assumptions and do not take into account the additional impacts on the remainder of the force which may result from "tinkering" with the emotionally charged issue of retired pay.

SUMMARY

In view of the similar results from different methods of analysis, it seems both conservative and highly probable that we can anticipate:

1. An immediate impact of about 2,000 additional separations, and
2. A steady state impact of at least 500 additional separations annually.

Attachment: Survey.

FORMER SPOUSE LEGISLATION IMPACT SURVEY

The purpose of this survey is to assess the impact of recently proposed legislation which Congress is now considering in regard to the legal entitlements of a former spouse to a portion of a member's military retired pay.

A recent Supreme Court Decision ruled that state courts could not consider retired pay as property subject to division in divorce settlements since the statutes make it clear that retired pay is the personal entitlement of the retiree. In its opinion the Court stated that the military retirement system was designed to accomplish two major goals: (1) to provide for the retired service member; and (2) to meet the personnel management needs of the active military forces. However, the Supreme Court stated that Congress may well decide that more protection should be afforded a former spouse of a retired service member. In response, several members of Congress have introduced bills that would allow courts to provide the former spouse of a military member with a portion of the member's retired pay. If enacted, this type of legislation would allow state courts to treat military retired pay as though it were an item of property in a divorce or separation settlement. The proposed legislation would allow the division of expected future retired pay even if the member had not become entitled to it and had not retired. Payments would not begin until the member retired and began receiving retired pay.

The proposals vary somewhat, but in a typical provision, a member married for 5 years or more while on active duty, could have a portion of his or her retired pay awarded to his or her former spouse if the divorce court determined it was appropriate. The amount awarded would be limited to 50 percent of disposable retired pay (after taxes and other deductions). For example, let's assume a MSgt (E–7) was married for 10 years while on active duty. If the E–7 retired with 20 years of service today, his/her retired pay would be about $615 per month after taxes and other deductions. Further assume that based upon the 10 years of service during which the member was married to the former spouse, the court determined that one half of the disposable retired pay, $307.50, is property accumulated during the marriage. In those states where property accumulated during a marriage must be divided equally among the partners, the amount which could be awarded an ex-spouse probably would not exceed $153.75 per month. However, the court could also order additional amounts for alimony and child support, but $307.50 would be the maximum amount that would be payable to the ex-spouse for alimony, child support, and property settlement out of the retired pay. The court could order payment of additional amounts from sources other than military retired pay.

Divorce settlements typically include a property settlement, a provision for spouse support or alimony (some States have no provision for alimony), and child support. There have been many settlements in which the parties involved believed they received unjust settlement because of the way retired pay was treated. These cases of alleged injustice have involved both the member as the injured party and the former spouse as the injured party. It is not the intent of this survey to determine the most equitable or just treatment for divorced members or spouses, but to examine attitudes toward proposed legislation, how such legislation might affect military members, and how many would be affected. Your thoughtful responses will be useful in accomplishing this purpose.

SECTION A—FOR ALL PERSONNEL

1. How many years of Total Active Federal Military Service (TAFMS) have you completed?

Enlisted

a. 0–4
b. 5–8
c. 9–12
d. 13–19
e. 20 or more

Officer

f. 0–4
g. 5–8
h. 9–12
i. 13–19
j. 20 or more

2. What is your grade?

Enlisted

a. Airman basic
b. Airman
c. Airman First Class
d. Senior Airman/Sgt.
e. Staff Sgt.
f. Technical Sgt.
g. Master Sgt.
h. Senior Master Sgt.
i. Chief Master Sgt.

Officer

j. Second Lieutenant
k. First Lieutenant
l. Captain
m. Major
n. Lt. Colonel
o. Colonel

3. What is your sex?
a. Male
b. Female

4. Which of the following best describes your current marital status?
a. Never married
b. Married and never divorced
d. Divorced and not remarried
e. Legally separated
f. Other, never divorced
g. Other, previously divorced

5. What are your present plans for staying in the Air Force?
a. I am retirement eligible
b. Plan to make the Air Force a career (at least 20 years)
c. Plan to separate short of a career
d. Undecided at present

6. Do you believe that Congress should pass a law that would permit a state to award a portion (up to 50 percent) of a member's disposable military retired pay to a former spouse(s)?
a. Strongly believe such a law should be passed
b. Somewhat believe such a law should be passed
c. Neutral toward such a law
d. Somewhat believe such a law should not be passed
e. Strongly believe such a law should not be passed

7. What effect would the passage of "former spouse retired pay legislation" have on your perception of the military retirement system as a career incentive?
a. Major positive effect
b. Minor positive effect
c. Neutral
d. Minor negative effect
e. Major negative effect

8. If Congress passed some form of "former spouse retired pay legislation" how would your Air Force career plans change? (Choose only one response below a thru i)
a. No change in my career intent
I am retirement eligible and I would change my intentions and:
b. Retire earlier than planned
c. Retire later than planned
My career intent would change from stay for a career to:
d. Separate short of a career
e. Undecided

My career intent would change from separate short of a career to:
f. Stay for a career
g. Undecided
My career intent would change from undecided to:
h. Stay for a career
i. Separate short of a career

9. Would passage of former spouse retired pay legislation change your plans to remain in service for the next 12 months?
a. No, I am not eligible for separation in the next 12 months
b. No, I am eligible to separate during the next 12 months and plan to separate regardless
c. No, I am eligible to separate during the next 12 months and plan to stay regardless
d. Yes, I am eligible to separate during the next 12 months and would have stayed but would now separate
e. Yes, I am eligible to separate during the next 12 months and would have separated but would now stay

10. Would you willingly accept reassignment to a state which you know would divide military retired pay as property in a divorce settlement?
a. Yes
b. No
c. Undecided

As an alternative to treating retired pay as divisible property another proposed legislative initiative would amend the existing Federal statute that now authorizes the garnishment of active duty or retired pay for alimony and child support to also allow garnishment to satisfy a court-ordered property settlement if the member was in arrears. The major differences in this proposal and those discussed above are that (1) retired pay would not be considered as property for division in a divorce settlement, (2) a former spouse would not have a vested *entitlement* to a portion of a member's retired pay and (3) the member would have to be in arrears before the court could order direct payments.

11. In comparing the alternative proposal above to those described in the introduction to the survey, which type of proposal do you favor?
a. Originally described proposals (in introduction to survey).
b. Alternative proposal (as stated above).
c. Neither.
d. Undecided.

12. What is your state of legal residence?
a. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, or Washington.
b. Alaska, Colorado, Delaware, Hawaii, Illinois, Iowa, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, or Wisconsin.
c. Other.

13. What state are you currently living in? (Use response a, b, and c from question 12 as appropriate.)

SECTION B—FOR PRESENTLY MARRIED PERSONNEL ONLY

If not presently married, do not answer questions 14 or 15. Go immediately to Section C

14. How many years have you been married to your present spouse?
a. Less than 5 years
b. 5–9 years
c. 10–19 years
d. 20 years or more

15. How many years during your present marriage have you been on active military duty?
a. Less than 5 years
b. 5–9 years
c. 10–19 years
d. 20 years or more

SECTION C—FOR DIVORCED OR PREVIOUSLY DIVORCED PERSONNEL ONLY

If you have never been divorced, do not answer the following questions; turn in your completed survey

16. How much if any alimony and/or child support do you pay to a former spouse(s) each month?
a. None
b. Less than $250
c. $250–$500
d. $500–$750
e. $750–$1,000
f. More than $1,000

17. How many total years of marriage did you have with a former spouse(s)?
a. Less than 5 years
b. 5–9 years
c. 10–19 years
d. 20 years or more

18. How many total years of marriage did you have with a former spouse(s) while on active duty?
a. Less than 5 years
b. 5–9 years
c. 10–19 years
d. 20 years or more

19. How many years of active duty did you have when your most recent divorce became final?
a. 0–4
b. 5–8
c. 9–12
d. 13–19
e. 20 or more

FORMER SPOUSE LEGISLATION IMPACT SURVEY

Senator EXON. What assumptions were used in this study concerning state divorce laws and the level of award made by state courts?

General IOSUE. No particular assumptions were used concerning individual differences in state divorce laws since the legislation is viewed as a potential threat to all. We believe this is both appropriate and justified since:

(1) our people understand that there can be no iron-clad guarantees that previously settled cases will not be reopened, and

(2) the perception of the threat will be as important a motivator as the actual threat itself.

Study assumed the level of award made by state courts would depend and vary upon the length of the marriage before the divorce and would equate to 50 percent of the retired pay attributable to the length of marriage during which the member performed creditable service. For example, if the marriage lasted 5 years during which the member performed creditable service the award would be 12½ percent of retired pay (i.e., 25 percent of retired pay divided 2); 10 years equal 25 percent of retired pay divided 2) etc.

Senator EXON. Was a survey conducted as a part of this study? Please provide a copy of the questions used in this survey. How large was the sample surveyed, and what were the results?

General IOSUE. Yes, an Air Force survey (attached) was conducted in February 1982 to assess the attitudes of the force towards the proposed legislation. The survey sampled 1,770 officers and 3,570 enlisted members. The survey sample was scientifically drawn to assure 95 percent confidence in obtaining data that would accurately reflect the officer and enlisted forces as a whole, plus accurately reflect the data by Total Active Force Military Service year groupings. The survey results were then applied to the total officer and enlisted force members to extrapolate data for the entire Air Force. Responses to the survey indicated that approximately 33,500 members would change their career intention and separate from the service if legislation passes and, in addition, about 55,000 would change from "career" to "undecided."

IMPACT OF S. 1814 ON RETENTION

Senator EXON. Please provide a copy of the study on the impact of S. 1814 on retention for the record.

General IOSUE. See response to first question.

RECALL FOR UCMJ ACTION

Senator EXON. All of you, when was the last time a military retiree was involuntarily recalled to active duty or tried under the provisions of the Uniform Code of Military Justice?

AIR FORCE

General IOSUE. The military retirement program serves national defense interests in insuring a large, standing resource of experienced manpower for national mobilization. All retired personnel are subject to *involuntary* recall to active duty. Although specific provisions vary, all retirees may be recalled in time of Congressionally declared war or national emergency. The majority of retirees are physically fit and under age 60 and represent our most significant individual surge capability.

OSD planning guidance directs the use of retirees as a mobilization resource. Minimum planned utilization is as follows:

Air Force: 5,000; Army: 100,000; Navy: 130,200; Marines: 45,000; and TOTAL: 300,200 (28 percent of total retired population; 48 percent of non-disability retired under age 60).

Wartime roles include CONUS, overseas duties, and assignment to deployed units in combat theater.

While substantial numbers of Air Force retirees were last recalled during WWII, this fact in no way obviates the need for retirees in time of national emergency.

The Air Force Automated Military Justice Analysis and Management System does not include data on whether an accused was an active or retired member. Computer assisted research in military appellate decisions reveals that the last known court-martial of a retired Air Force member is that of Paul P. Dunn, a retired chief warrant officer. He was tried in Turkey in April 1971 for 34 specifications of making and uttering worthless checks totalling $5,600. He was convicted of 30 of the specifications and his sentence as approved on appeal was a dishonorable discharge and 20 months was suspended. His case on appeal is reported in *United States* v. *Dunn*, 44 C.M.R. 929 (A.F.C.M.R. 1972), *pet denied*, 44 CM.R. 939 (C.M.A. 1972).

ARMY

General WEBB. There has been no known involuntary retiree recall undertaken by the Army. The Army has, however, recalled a number of military retirees with their concurrence to meet the Army's priority needs.

The last trial of an Army retiree under the Uniformed Code of Military Justice was *United States* v. *Hamilton* in 1949. In that case, Colonel Hamilton (USA, Retired) was tried for sale of property previously owned by the Government without giving first right of refusal, i.e., first option to buy, to the Government. He was acquitted.

The impact of S. 1814 on our current plans for involuntary retiree recall in the event of mobilization does not revolve around those two historical facts.

In the past, a draft provided essential manpower. In the case of greater conflict, as with the World War II, the American ethic of willing response to a National need in addition to the draft meant that no involuntary recall was required.

The threat is different today because world conditions and potential hostility scenarios will not permit extended start-up time. The mobilization requirement is to provide pretrained individual manpower immediately. This capability is provided by law (10 U.S.C. 688).

Currently, some 90,000 retirees have their recall orders in-hand should we need to mobilize them. Plans call for that number to increase significantly.

I believe that changing the nature of military retired pay as envisioned in S. 1814 will adversely affect those mobilization plans.

NAVY AND MARINE CORPS

Admiral ZECH and General BRONARS. (1) Recall to Active Duty: The Marine Corps has no records of when the last retirees were involuntarily recalled to active duty. Two important points to note are that all military retired members are subject to being recalled and that our mobilization plans count on a substantial number of retirees to meet wartime requirements. Members of a regular component are subject to be involuntarily ordered to active duty at any time by the Service Secretary of the Military Department concerned. The Secretary of a Military Department may also order a retired member of a reserve component to active duty, on the basis of required skills, provided that war or a national emergency has been declared by Congress or if there are not enough qualified reservists in an active status or in the inactive National Guard. This capability ensures a large, standing resource of skilled, experienced manpower to meet wartime requirements.

(2) Tried under provisions of the UCMJ: The most recently reported court-martial of a military retiree involved a service member who had been placed on the temporary disability retired list. The charges were based on issuing bad checks aboard a military installation in Newfoundland. *United States* v. *Bowie*, 14 USCMA 631, 34 CMR 411 (1964).

In 1961, the right to recall a regular retiree for court-martial based on an offense committed prior to retirement was upheld as constitutional. *Chambers* v. *Russell*, 192 F. Supp. 425 (1961).

Perhaps the most famous case involves the trial of a retired Navy Rear Admiral for an offense committed after his retirement, *United States* v. *Hooper*, 9 USCMA 637, 26 CMR 417 (1958).

Trial of retirees by court-martial is limited to those cases exhibiting unusual circumstances that impact adversely upon the military services. This is based on Departmental Policy, and Secretarial approval is required prior to exercising jurisdiction. JAGMan section 0107 d. (1) (a).

In this regard, the Secretary of the Navy recently declined to permit the court-martial of a Navy retiree.

INVOLUNTARY RECALL AND UCMJ TRIAL OF MILITARY RETIREES

Background.—The 1961 involuntary recall of a retiree to active duty was for the purpose of trial under the UCMJ. The case was *Chambers* vs. *Russell* 192 Fed. Sup. 425 Northern district of California. It basically upheld Article 24 of the UCMJ, which provides that retired officers are subject to UCMJ and can be involuntarily recalled to active duty for the purpose of disciplinary action regardless of the declaration of war or national emergency.

PENSIONS EARNED BY DIVORCED SPOUSES

Senator EXON. Gentlemen, all of you realize that more and more women today are pursuing careers. Many earn pensions or retired pay of their own.

Under the current Supreme Court decision, and even under the 15-year minimum marriage requirement proposed by the Defense Department, it is very possible that a pension earner divorced from a military member could have no right to any portion of the member's pension, while the military member could receive a major portion of his former spouse's pension.

Is this really a fair and equitable situation?

AIR FORCE

General IOSUE. Concur that the situation is unfair. However, as a practical matter it is unlikely that a court would award a military spouse a portion of the civilian spouse's pension when military retirement pay is not divisible. If a court made such an award, it seems likely that the court would compensate the civilian spouse with an offset of other marital property. We continue to oppose any consideration of military retired pay as property. In the situation described, the Air Force believes that military retirement pay should be the entitlement of the member only and that the civilian pension should be the entitlement of the civilian spouse only. The situation could be corrected by an amendment to state law which precludes a military member who is married to a civilian pension earner from entitlement to a portion of that spouse's retired pay.

ARMY

General WEBB. The premise of the question is not really valid. Military retired pay is not a pension of the type earned by the spouse in the cited example. As discussed throughout the testimony of all the witnesses before the subcommittee, the difference between a military retired pay and a pension cannot be overlooked.

In the situation described, absolute application of inflexible rules might produce the divorce settlement described. However, a significant and common feature of the testimony is that each case should be examined on the full understanding of all the facts and circumstances with military retired pay considered as income when determining alimony and/or child support. The point is that military retired pay should not be considered as community property for division in the divorce settlement. No one has suggested protecting military retired pay from consideration in the judicial decision.

NAVY AND MARINE CORPS

Admiral ZECH. The pension of a service member's spouse would be divisible to the extent that it represented community property. Private pension plans generally are contributory in nature, i.e., a portion of the wage earner's pay is withheld and invested in the plan. To the extent that the contributions are community property, e.g., earnings of the contributing spouse while the couple are married and living together, then a proportional share of the pension is itself a community asset and subject to division.

On the other hand, Individual Retirement Accounts (IRAs) are *not* divisible regardless of the nature of the contribution. Thus the IRA of a working spouse of a service member may not be divided. However, if a service member invests in an IRA and includes a nonworking spouse in the account (which permits a maximum contribution of $2,200 annually), that account *is* divisible.

The appearance of inequity suggested by the question results from the fundamental difference between pension plans and retired/retainer pay. It is incorrect and potentially misleading to characterize military retired/retainer as a pension since it in fact is reduced pay for reduced service. The fact that it does not vest until the service member has 20 years service and the fact that it is subject to defeasance at any time, even after vesting (as by, among others, punitive discharge of the service member while still on active duty or dropping a retiree from the rolls under 10 U.S.C. section 1161), points out this difference.

DIVORCED AIR FORCE MEMBERS

Senator EXON. General Iosue, you conclude "Considering that there are about 85,000 Air Force active duty members who are either divorced, separated, or divorced and remarried, making retired pay subject to property division presents important implication for retention and force management."

Were any of these 85,000 individuals divorced, separated, or divorced and remarried *prior* to the *McCarty* decision? How many? How does this legislation affect them? Presumably they already were exposed to state laws dividing military retired pay and faced possible "discouragement" with respect to retention as a result of such exposure.

General IOSUE. As a point of clarification, the survey revealed that approximately 89,300 Air Force active duty members were either divorced, separated, or divorced and remarried. Many of these individuals were divorced, separated, or divorced and remarried prior to the *McCarty* decision.

We estimate that between 90 and 95% of these 89,300 individuals were divorced, separated, or divorced and remarried prior to the *McCarty* decision.

The legislation could possibly affect pre-*McCarty* divorce decrees. The extent would depend upon the views adopted by courts of the various states on such issues of retroactivity and res judicata.

ENTITLEMENT UNDER THE BILL

Senator EXON. General Iosue, you state that S. 1814 "would entitle a former spouse to a portion of a member's retired pay after only five years of marriage." What specific provision in the bill provides such as entitlement?

General IOSUE. I have reviewed my statement and am unable to locate the quotation that you cite. It is possible that you have a copy of the original statement which erroneously included "entitle" and was later modified to read, "We also have reservations about the provision of S. 1814 that would enable a former spouse to receive a portion of a member's retired pay after only five years of marriage."

COMMUNITY PROPERTY STATES

Senator EXON. Would court in a community property state be required to award one-half of the member's retired pay to a former spouse in a marriage which had lasted only 5 years during which time the member was earning credits toward retirement?

General IOSUE. We have never stated nor implied that S. 1814 would require a State to award a former spouse 50 percent of the member's retired pay based on five years of marriage. What we have asserted is that courts could award the former spouse a pro rata part of the retired pay earned by the member during the period of the marriage during which the member performed creditable service. For example, under S. 1814 if the marriage lasted five years during which the member performed creditable service, the court could award 12½ percent of the member's retired pay; 10 years=25 percent; 15 years=37½ percent; 20 years=50 percent.

STATE LAWS

Senator EXON. General Iosue, please provide for the record, the States, along with pertinent court decisions and statutes for each state, which "probably would consider military retired pay as divisible marital property if S. 1814 or a similar bill were enacted."

General IOSUE. Based upon research into applicable statutory and case laws, conclusions can be drawn about the possible and probable effects of the passage of S. 1814.

(a) The research revealed nine states which would almost certainly consider enactment of S. 1814 as a green light to return to their pre-*McCarty* practice of treating military retired pay as divisible marital property.[1]

(b) Based on existing statutory or case law, another fourteen States would probably implement the legislation.[2]

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[1] Courts of these States have held that military retired pay is divisible property: Arizona, California, Idaho, Illinois, Michigan, Montana, New Mexico, Texas, and Washington.

[2] It is anticipated that these states would quickly implement S. 1814: Delaware, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Missouri, New Jersey, New York, Oregon, South Dakota, Utah, and Wisconsin.

Delware: Held—Supreme Court relying on California ruling, finds pension benefits both vested and non-vested to constitute interest divisible as marital property. (***Robert C.S. v. Barbara J.S.***, 7 FLR 2749.)

Hawaii: Held—All forms of deferred compensation or retirement benefits will continue to be treated as part of marital estate under H.R.S. 580–41 except military (after ***McCarty***) and railroad retirement benefits (Hisquierdo). (***Linson*** v. ***Linson***, 1 Ct. App. (Oct. 21, 1980).)

Iowa: Held—Pension taken into account but not among assets directly divided. (***Re Marriage of Ralston***, 242 N.W. 2d 269 1976.)

However: Held—Future military benefits can be taken into consideration by court in making division where Congress had not expressed specific intent to exclude it. ***Re Marriage of Schissel***, 292 N.W. 2d 421 1980.)

Kentucky: Held—Military retirement pay not property subject to division on preemption grounds. (Hisquierdo). (***Russell*** v. ***Russell***, 605 S.W. 2d 33 (KY App. 1980.)

Held—Vested private pension is property subject to division. (***Foster*** v. ***Foster***, 589 S.W. are divisible marital property. (***Ohm*** v. ***Ohm***, Md. Ct. Spec App. Aug. 15, 1981, 7 FLR 2602.)

Lousiana: Held—Wife entitled to her share of husband's retirement pension (***Sims*** v. ***Sims***, 350 So. 2d 919, 4 FLR 2416.)

No decision available to us as to military retirement pay—

Maryland: Held—Pension benefits earned during marriage whether vested or non-vested, are divisible marital property. (***Ohm*** v. ***Ohm***, Md. Ct. Spec App Aug. 15, 1981, 7 FLR 2602.)

Held—Distribution of military pensions is preempted for federal law, as held in ***McCarty***. (***Hill*** v. ***Hill***, Md. Ct. App Oct. 27, 1981.)

Minnesota: Held—Pension benefits are property and should be considered by court in determining the distribution of property and the award of alimony in a dissolution proceeding. (***Elliott*** v. ***Elliott***, 274 N.W. 2d 75, 10/20 (1978), 5 FLR 203 (Minn Sup Court).)

Missouri: Held—That the analysis used by the U.S. Sup. Court in *McCarty* prohibits treatment of federal military nondisability retirement pay as marital property under Missouri equitable distribution law. (***Pruitt*** v. ***Pruitt***, Mo. Ct. App. E. Dist, 9/15/81, 7 FLR 2778.)

Applies the reasoning of the ***McCarty*** decision to private pension benefits. (***Kuchta v. Kuchta***, 50LW2165 (Mo. Sup Ct 9/8/81).)

New Jersey: Held—Supreme Court affirms decision of Superior Court that a husband's military retirement pay and disability benefits are available for distribution to wife. (***Krueger*** v. ***Krueger***, 375 A. 2d 659, 3 FLR 2575; also see: 354 A. 2d 340, 2 FLR 2377.)

New York: Held—Future benefits of pension plan subject to equitable distribution. (***Martinez*** v. ***Martinez***, N.Y. Supreme Court (Nassau County), 10/13/81, 7 FLR 2781.)

No case law received as to military benefits—

Oregon: Held—Supreme Court upheld the registration of a California judgment whereby husband was required to pay his divorced wife a share of future military retirement payments, as community property. (***Schroeder*** v. ***Schroeder***, 533 P. 2d 350 (1975).)

Held—U.S. Foreign Service eRti ement bene ts are divisible. (***Rogers*** v. ***Rogers***, Oregon App. (1989), 6 FLR 3037 (Before new federal legislation).)

(c) In the remaining twenty-eight jurisdictions (including the District of Columbia), a decree of uncertainty exists. Eight States' courts have held that military retirement benefits are not divisible,[3] and twenty jurisdictions (including the District of Columbia) are silent.[4] Of the twenty, it is probable that at least one will implement S. 1814.[5]

Thus, it appears that twenty-four states will probably implement S. 1814.

In evaluating the remaining states and the District of Columbia, one should consider the probability that those states may take the passage of S. 1814 as a signal to treat retirement pay as property that is divisible upon divorce.

It seems probable that at least twenty-four states will implement the legislation, and there is reason to believe that the remaining states and the District of Columbia will begin treating military retired pay as divisible property.

DIVORCE JURISDICTION

Senator EXON. General Iosue, is state jurisdiction over the individual for purposes of granting a divorce always synonymous with state jurisdiction to apply its law to division of the property? Isn't it the law of the domicile of the property which governs? For example, in the recent Court of Claims decision in *Morton* (which involved the Air Force) didn't the trial judge decide that the Alabama court had no power to divide up the Colonel's property because he was not domiciled in Alabama? Haven't other courts—even in community property states—applied this concept of military domicile? *See e.g. Stephens* v. *Stephens* (N. Mexico).

General IOSUE. There is a distinction between jurisdiction over the marriage, and jurisdiction over the property. However, if the court has *in personam* jurisdiction over the member, it would have jurisdiction to deal with all property of the member, including retired pay (if legislation were passed declaring the pay to be property).

The *Morton* case did not turn on the fact Colonel Morton was not *domiciled* in Alabama. It turned on the lack of *in personam* jurisdiction over him. The court discussed at great length the concept of "minimum contacts" as set forth in *International Shoe Company* v. *Washington*, 326 U.S. 310 (1945), and its progeny. After considerable discussion, the court concluded:

"The circumstance that the plaintiff's minor children were living in Alabama during the 1974–75 period with his consent and he was providing financial support for the children was not sufficient to confer on the Alabama court jurisdiction to enter a money judgment against Colonel Morton for alimony and child support on the 'minimum contacts' theory. *Kulko* v. *Superior Court of California*, 436 U.S. 84, 4 FLR 3075 (1978). * * *

"In order to justify a determination in the present case that the Alabama court had jurisdiction to enter judgment against Colonel Morton for alimony and child support under the 'minimum contacts' theory, it would be necessary that the evidence in this case show acts by which Colonel Morton purposefully availed himself of the privilege of conducting activities within Alabama, thus invoking the benefits and protection of its laws. *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). Such evidence is lacking.

"It is my opinion, therefore, that the Alabama court did not have jurisdiction, under the 'minimum contacts' standard, to enter money judgment for child

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South Dakota: Held—Present value of husband's retirement account must be included (although not payable until his retirement in dividing c uples property evaluation). (*Hansen* v. *Hansen*, 273 N.W. 2d 749, SD Sup Ct, 5 FLR 2351 (1979).)

No cases received as to military benefits.

However: New legislation adds to the marital est. e divisible upon divorce any pension or retirement plan whether vested or not. (Leg. Bill 622, 7 FLR 4071.)

Utah: Held—That benefits such as veterans disability pension and retirement pay are marital property subject to division. (*Martinett* v. *Martinett*, 351 P. 2d 821.)

Wisconsin: Held—Retivement funds are marital assets to be divided. (*Bloomer* v. *Bloomer*, 267 N.W. 2d 235 (1978).)

No case law on military benefits—

[3] Courts of these states have held before *McCarty* that military retired pay is not divisible: Alabama, Alaska, Arkansas, Colorado, Indiana, Nebraska, New Hampshire, and Oklahoma.

[4] In these states, no cases were found which discuss the issue: Connecticut, District of Columbia, Florida, Georgia, Kansas, Maine, Massachusetts, Mississippi, Nevada, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wyoming.

[5] In the cases of *Higgins v. Higgins*, Florida Court of Appeals, 1st District, 8 FLR 2200 (1982) the court stated that *McCarty* is not violated "when a Florida court awards permanent alimony after consideration of a military pension as an asset of . . . the retiring spouse.' It is clear, the court concludes, "that the needs of national defense, as seen by Congress, do not require state courts to avoid all use of military pensions in support cases." It is submitted that this indicates the court felt constrained by *McCarty*, a constraint that would be removed by S. 1814.

support and alimony against Colonel Morton in the divorce case." 8 FLR 2145 (1982)

While it is arguable that the law of the state of domicile of the member should control the treatment of retired pay, we are not aware of a reported case that has so held when the trial court had *in personam* jurisdiction over the member.

SOLDIERS AND SAILORS CIVIL RELIEF ACT

Senator EXON. General Iosue, you mention the possibility of divorce proceedings with the member not present because of military circumstance to protect his or her interests. Doesn't the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. App. 520–521) provide protection to an active duty service member in that situation? Does anything in S. 1814 alter that protection?

General IOSUE. The Soldiers' and Sailors' Civil Relief Act (Act) does provide *some* protection, and this is not directly altered by S. 1814. This protection, however, is not all inclusive. Article II of the Act outlines the so-called "General Relief" provision, and, among other things, deals with default judgments, and stays of proceedings. The stay is discretionary with the trial court, and a procedure is outlined for overturning default judgments. Enforcing these rights can be time-consuming and expensive, and judge advocates, particularly those who have served overseas, have seen "horror stories" about how the Act is circumvented or ignored. The *McCarty* decision, in effect, imposed a national, judicial limit on the ability of courts to take advantage of an absent service member.

A related and more compelling concern is that the Act will not prevent a court from exercising jurisdiction over a member who is assigned to a state by virtue of military orders even though he is domiciled in a different state. The Act is designed to protect only those members who, because of their military duties, would be unable to adequately defend themselves in a court of law. Under the Act, the only relief is a postponement of the action until the member can appear in court and present his or her defense. It is unlikely that a member who is physically residing in the state in which the action is brought would be held "unable to defend" his/her position adequately.

FORUM SHOPPING

Senator EXON. General Bronars, doesn't the service member who is sued by his or her former spouse for divorce in a state in which the service member is present solely due to military orders, and is not domiciled, have the right under principles of law to have the court apply the law of his/her domicile in any divorce proceedings? Doesn't that afford the service member a degree of protection against forum shopping?

General BRONARS. Except for the protection afforded a service member under the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 App. U.S.C. section 501 et seq.), there is no principle of law affecting the civil remedies available to service members not available to the general public. The Act does not protect service members from suit in states in which they are not domiciled nor does it provide for application of the law of the service member's domicile in any such suits. Of the approximately 50 substantive sections of the Act, only one, section 574, residence for tax purposes, provides protection based on domicile. Of the four sections directly related to suits of the type addressed in the question, none provides any such protection:

Section 520 requires the appointment of an attorney to represent a service member before a default may be entered against him/her and provides discretionary authority for the court to set aside a default *if* the service member can show that he/she was prejudiced in making a defense by reason of military service and if it appears that the service member has a meritorious or legal defense.

Section 521 provides discretionary authority for a court to stay any action if the service member's conduct of the action is materially affected by reason of military service.

Section 23 provides similar relief to permit the stay of execution of judgments.

Section 590 provides anticipatory relief under similar circumstances.

These protections are considerably attenuated in practice because the burden is generally upon the service member to establish that his military service materially affected his rights, and more importantly because the relief permitted is discretionary with the court. The standard of review, therefore, is for abuse

of such discretion; hence, very few judgments are reversed on appeal notwithstanding noncompliance with the Act.

CHANGES TO MILITARY RETIRED OR RETAINER PAY

Senator EXON. Admiral Zech, you state that "any changes made to (military retired or retainer pay) will impact on the active duty force structure."

How does this legislation, in and of itself, change the military retired and retainer pay scheme? If it does change it, doesn't it merely change it back—with some additional limitations in favor of the service member—to what it was on June 25, 1981? If not, why not?

Admiral ZECH. Senator Exon, S. 1814 would change the military retired and retainer pay scheme by permitting each of the States to redefine the purpose, and therefore the nature, of military retired or retainer pay. By allowing the States to treat retired and retainer pay as community property we would reduce the effectiveness of the military retirement benefit as a personnel management tool. It would become a property right of service members and their spouses in some states, but not in others. Such an action would not merely change the retirement pay system back to what it was on June 25, 1981, the day before the U.S. Supreme Court *McCarty* decision.

I will summarize the "pre-*McCarty*" situation as I see it. Eight states were attempting to treat military retired or retainer pay as if it were community property. California was dividing some military retirees' retired or retainer pay in divorces since 1941 but did not so treat active duty members' retired or retainer pay until 1974. The number of service members involved was small in relation to the total armed forces. Most service members were unaware that this was taking place.

If S. 1814 were enacted the situation would change. All 50 States would be permitted to treat military retired or retainer pay as community property. All spouses married for 5 years to a service member during 5 years of creditable service would be vested with an entitlement to a portion of military retired or retainer pay if they became divorced. A signal would be sent that Congress may intend, and certainly will not prohibit, that the States should treat military retired or retainer pay as community property. I would anticipate the expansion of this practice to more states. The former spouse issue is being well publicized now. Most, if not all, members of the armed forces will be aware of this potential reduction to military retired pay. The reaction of the relative few who have experienced this has been disillusion and discontent. We would have to expect that this disillusionment and discontent would be significantly multiplied.

I believe that the "post S. 1814" situation would be significantly different from the June 25, 1981 situation. We would see the increased practice of dividing retired and retainer pay with a more informed and aroused career force. There would be a substantial loss of the effectiveness of the retirement pay attraction to the career force. The predictable result would be lowered career retention and an increase in detailing problems as members are disadvantaged by assignment to "community property" states.

REDUCTION IN MILITARY RETIRED OR RETAINER PAY

Senator EXON. Admiral Zech, is there any provision in this bill which "reduces" military retired or retainer pay?

Admiral ZECH. The provision in S. 1814 which reduces the amount of miltiary retired or retainer pay due to the service member is the authority granted to the States to treat disposable retired or retainer pay as property of the service member and his or her spouse. Insofar as the member's spouse is granted a property right to some portion of military retired or retainer pay, the service member's present sole entitlement to retired or retainer pay is diminished.

MANAGING MILITARY FORCE

Senator EXON. Admiral Zech, your statement indicates that "permitting State divorce courts to treat military retired pay as community property will result in inconsistent decisions that may be counterproductive to our efforts to manage the military force." Did the Navy experience such results before the *McCarty* decision sheltered military retired and retainer pay? Explain these results in detail?

Admiral ZECH. Prior to the U.S. Supreme Court *McCarty* decision some service members had a portion of their military retired pay ceded to their spouse as the spouse's property in a few "community property" States. The majority of service

members who experienced divorce decrees in other States retained sole entitlement to their retired or retainer pay while providing spousal support.

Although we have never maintained written records of divorces or detailing problems resulting from divorces or pending divorces, we have documented some instances that show the Navy was experiencing personnel management problems as a result of divisions of retired or retainer pay as community property. We conducted a survey in April 1982 of detailers and assignment officers at the Naval Military Personnel Command. The survey revealed 44 cases from 1980 to April, 1982 of Navy personnel who were reluctant, or attempted to refuse, to accept orders to a State due to that State's divorce laws and the member's fear of anticipated financial loss as a result of division of the member's retired pay due to a divorce. The cases included both officers and enlisted members. Most of these sought to avoid orders to 8 States which have divided military retired or retainer pay as community property. The two States most frequently identified were California and Washington. The survey had limitations, principally because it was feasible only to survey current detailers.

I expect that future detailing problems would be significant if S. 1814 is enacted. This entire issue is being publicized now. More service members are aware of it than there were formerly. More States will probably divide retired or retainer pay, and the national divorce rate is rising.

FORGO RETIREMENT PAY

Senator EXON. Admiral Zech, in your statement you ask whether the typical Navy retiree "will understand that the government wants him to forego a portion of his retirement pay if he happens to get a divorce." Is there any provision in S. 1814 that *requires* or *indicates a preference* that military retirees give up portions of their retired pay? What provisions? Doesn't S. 1814 turn this issue over to the bodies that had been deciding it for years—the State courts?

Admiral ZECH. S. 1814 provides that the States may treat disposable military retired or retainer pay as property of a service member and his spouse. Insofar as States elect to treat military retired or retainer pay in this manner, this will result in a diminution of a divorced member's retired or retainer pay. I believe enactment of S. 1814 could be interpreted by many States as an indication of the preference of Congress that military retired or retainer pay should be treated as property of the member and the spouse. The U.S. Supreme Court in the *McCarty* decision observed that whether the personnel management goals of the military retirement system should be subordinated to the protection of the service member's ex-spouse is a policy issue for Congress to decide. It has been stated repeatedly in hearings on this bill that this issue is being considered in light of the U.S. Supreme Court *McCarty* decision and the court's "invitation" to pass legislation. Because of these facts, I think it is reasonable to consider the probability that many States may take the passage of S. 1814 as a signal from Congress to treat military retired or retainer pay as property that is divisible upon divorce.

I also do not judge that S. 1814 simply turns this issue over to the State courts that had been deciding it for years. Historically only 8 "community property" States and a small number of other States were clearly treating military retired or retainer pay as divisible property in some divorces. S. 1814 would permit *all* of the States to so treat military retired or retainer pay. What has been a small and not well publicized problem would probably become a large one for the Services and, consequently, for the nation.

I believe what S. 1814 would actually do is to significantly cede control of our most powerful career incentive to state divorce courts. Congress, not state divorce courts, is responsible for raising and maintaining the armed forces. Although acting in good faith, some state divorce courts which divided military retired pay as property were redirecting money paid to maintain our armed forces to other purposes. If we choose now to permit military retired pay to be redefined by the States to be the property of a service member and a spouse rather than a military personnel management tool, we will have lost significant control of this retention tool. We will then have to substitute some other costly incentive or suffer the loss of career personnel.

Senator JEPSEN. Thank you, gentlemen.

This committee meeting is adjourned.

[Whereupon, at 4:40 p.m., the subcommittee adjourned, subject to the call of the Chair.]

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